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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 418

A. B. HALE, AS CHAIRMAN, AND E. A. McCOLSKEY ET AL., ETC., APPELLANTS,

vs.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

FILED OCTOBER 15, 1928.

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[fol. a]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BIMCO TRADING, INC., a Corporation, and BROWARD COUNTY PORT AUTHORITY, a Public Corporation, Plaintiff,

vs.

A. B. HALE et al., as and Constituting the State Road Department of the State of Florida, Defendants

BILL OF COMPLAINT—Filed November 4, 1937

[fol. 1] Bimco Trading, Inc., a corporation, brings this Bill of Complaint against A. H. Hale as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins as and constituting the State Road Department of the State of Florida, and thereupon the plaintiff complains and says:

1. That it is a corporation organized and existing under and by virtue of the laws of the State of New York, and that it is a citizen and resident of said State.

2. That the defendants and each of them are citizens and residents of the State of Florida.

3. That at the last session of the legislature in 1937 the legislature of the State of Florida passed a certain act known as Senate Bill #760 providing for the alleged inspection of cement imported and brought into the State of Florida from any foreign country. A copy of which act is attached hereto and marked "Exhibit A" and made a part hereof for all purposes.

4. That the Plaintiff is an importer of cement from the Kingdoms of Denmark and Belgium; that the cement so imported by it is imported in original packages or containers which are heavy six (6) ply paper bags containing ninety-four (94) pounds net of cement, and that the cement so imported by it is manufactured by Aalborg Portland Cement Works of Aalborg, Denmark, and by the Obourg Portland Cement Works of Obourg, Belgium, and that both Companies have been shipping cement into the State of Florida for many years last past, and that the Aalborg

Portland Cement Works, in particular, has been so shipping cement into the State of Florida ever since 1892.

[fol. 2] 5. That the cement of said Companies, so imported by the plaintiff, is of a high quality and grade; that the minimum standard set up by the act in question is that of the American Society of Testing Materials which requires that cement shall be able to stand a minimum tensile strength test of two hundred seventy-five pounds per square inch after seven days, whereas the cement imported by the plaintiff to be sold in the State of Florida will test from three hundred thirty-eight to four hundred thirty pounds per square inch, and that no cement sold in the State of Florida is of higher or better grade than that manufactured and sold by the plaintiff.

6. That all cement sold by the plaintiff in the State of Florida complies in all respects with the standards set up by the said act and has been so complying for the past forty years or more.

7. That during said period it has imported into the State of Florida many millions of sacks of cement and that its cement is used by many persons, firms, corporations and dealers. That the cement which it ships into the State of Florida, notwithstanding its high grade and character, sells for a less price than any cement manufactured in the State of Florida, and consequently it is attractive to purchasers who can get a high grade of cement at a less price, and that consequently the importation of such cement is of great benefit to citizens and residents of the State of Florida, and is marketed in Florida at a price of $1.60 per barrel.

8. That the cost of ocean freight or transportation and terminal charges is seventy cents per barrel and that it is required to pay a tariff or duty of seventeen cents per barrel, leaving it the sum of Seventy-three cents out of which to pay the cost of manufacture, overhead and profit.

9. That the inspection charge of fifteen cents per hundred weight, as imposed by the term of this act, would require it to pay the sum of Fifty-seven cents additional, per barrel [fol. 3] and would leave it only sixteen cents to cover the cost of manufacturing and overhead, and the cost of manufacturing and overhead far exceeds sixteen cents per barrel, and consequently the effect of such act, if enforced, would

be to permanently prevent the plaintiff from shipping said cement into the State of Florida and would be denying to it the equal protection of the laws of the United States of America.

10. That for many years whenever required, inspection of cement shipped into the State of Florida by the plaintiff and persons, firms and corporations representing other cement manufacturers have been inspected by laboratories such as the Southern Analytical Laboratory of Jacksonville, and Nutting Laboratories of Miami, Florida.

11. That such persons and laboratories charge a regular fee of from Twelve Dollars and 50/100 ($12.50) to Fifteen Dollars ($15.00) to make a test of a shipload of cement, and the plaintiff's cement comes in only in ships and not otherwise.

12. That such a charge is applicable whether a ship brings in a cargo of one hundred tons or of three thousand tons.

13. That for example, a cargo of three thousand tons contains approximately eighteen thousand barrels of cement; that the cost of inspection heretofore paid by the plaintiff has not exceeded Fifteen Dollars ($15.00) per cargo, but that under the so-called inspection charge fixed by the provisions of the said act the actual cost of inspecting a three thousand ton cargo in accordance with the provisions of said act would be Nine Thousand Dollars ($9,000.00) which is so excessive as to constitute confiscation and that in truth and in fact the so-called inspection fees prescribed by said act are sixty times the actual cost of inspection made in accordance with the provisions of said act and Six Hundred times the necessary and customary cost of inspection as is now and, for many years last past, has been made in the cement industry in Florida.

[fol. 4] 14. That the purpose of the act is not, in any sense, to protect the citizens of Florida against cement which is inferior in quality, and its purpose is not to prevent the purpetration of a fraud on the people of Florida, but on the contrary, its purpose is to benefit a concern known as the Florida Portland Cement Company which manufactures cement at Tampa, Florida, and is the only concern so manufacturing coment in the State of Florida.

15. Plaintiff further alleges that the defendants are, under the laws of the State of Florida, given funds which are derived from taxation by the State of the Citizens and residents of the State of Florida solely for the construction, operation and maintenance of highways and bridges within the State of Florida. That such funds if used for another purpose would constitute a misappropriation thereof and would subject the defendants to penalties under the laws of the State of Florida.

16. That the act in question provides that it shall use and expend in endorcing said act only monies derived and collected thereunder.

17. That the plaintiff at the time of the passage of this act had, and still has, contracts with citizens of the State of Florida for the sale of the cement so imported, and to be imported by it and that the so-called inspection tax imposed by the provisions of said acts is so excessive and oppres-ive that the plaintiff cannot afford to import any cement or pay the cost of such so-called inspection and that it will lose all of its contracts and all of the profits it might otherwise make, the amount of which it is wholly impossible to estimate and the plaintiff alleges that the act, therefore, infringes on the plaintiff's right to contract with citizens of the United States to its great and irreparable injury.

18. Plaintiff Further Alleges that said act is unconstitutional and void and in violation of the Constitution of the United States of America in the following respects:

[fol. 5] (a) That it levies a tax on commerce between the United States and foreign countries and constitutes, as such, a direct burden on such commerce in violation of Article 1, Section 8, of the Constitution of the United States of America.

(b) That it likewise prohibits the importation in the State of Florida of a legitimate article of commerce, also in violation of Article 1, Section 8, of the Constitution of the United States of America.

(c) That it denies to the plaintiff and others, similarly situated, the equal protection of the law in violation of the fourteenth amendment to the Constitution of the United States of America.

(d) That it levies an impost or duty under the misnomer of an inspection law in direct violation of Article 1, Section 10 of the Constitution of the United States of America.

(e) That it likewise infringes on the right of contract guaranteed by the fourteenth amendment to the Constitution of the United States and is in violation thereof.

That the defendants have announced that they propose to immediately enforce said act and they have appointed, or are about to appoint, an inspector for that purpose and the enforcement of said act will prevent the plaintiff from making any sales of its cement whatever in the State of Florida and cause its contracts in said State to be broken to its immediate and irreparable injury.

Wherefore the Plaintiff Prays that this Court will enter a temporary restraining order restraining the defendants from the enforcement of this act until a hearing can be had on its constitutionality, and until a further order of this Court, and that it will hereafter issue a writ of injunction, both temporary and final, enjoining and restraining the defendants, their servants, agents or employees from enforcing, or attempting to enforce the said act and that they may have such other relief as may be proper.

[fol. 6] And the Plaintiff will ever pray, etc.

Martin H. Long, Solicitor for Plaintiff.

Duly sworn to by Carl W. F. Grimmelman. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO BILL OF COMPLAINT

Senate Bill No. 760

A Bill to be Entitled:

An Act providing for the fixing of a minimum standard for all cement offered for sale, sold or used in the State of Florida and to authorize and empower the State Road Department of the State of Florida to write rules and regulations for the effectual enforcement of this Act: Providing for the inspection of all cement imported and brought into the State of Florida from any foreign country and providing for an inspection fee to be paid for the inspection

of all cement imported and brought into the State of Florida from any foreign country and offered for sale, sold, or to be used in the State of Florida: Providing penalties for the violation of any of the provisions of this Act as well as any rule or regulation promulgated by the State Road Department: And providing for the enforcement of the provisions of and regulations made in pursuance of this Act.

Whereas, during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was manufactured in foreign countries and imported and brought into the State of Florida, and,

Whereas, in view of the fact that large numbers of dwellings, apartment house-, hotels and public buildings are constructed of cement or cement forms an integral part of the construction thereof, and,

Whereas, it is of Paramount Importance to the Public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the State of Florida, and,

Whereas, much of the foreign manufactured cement imported and brought into the State of Florida has been of inferior quality, and

Whereas, the importation and sale or use of foreign cement not — jeopardizes public safety but amounts to unfair competition being forced on this great industry in Florida,

Therefore:

Be it enacted by the Legislature of the State of Florida.

Section 1. That the State Road Department of the State of Florida is hereby authorized and required to fix a minimum standard for all cement offered for sale or sold or used in the State of Florida; said standard to be fixed by said State Road Department shall be the standard now in force and used by it in the purchase and use of cement in [fol. 8] the construction of public highways, which said standard of cement was set up by the American Society of Testing materials and approved by the United States Bureau of Public Roads for highway construction; and said standard is hereby fixed and designated as a minimum for all cement offered for sale or sold or used in the State of Florida, and it shall be unlawful for any person, persons, association of persons, firm or corporation to sell, offer for

sale or use in the State of Florida any cement in the construction of any hotel, apartment house, rooming house, dwelling or public building of any kind or character which does not measure up to the minimum standard herein fixed.

Section 2. It is hereby made the duty of the State Road Department to inspect all cement imported or brought into the State of Florida from any foreign country and sold or offered for sale or to be used in the State of Florida, and no cement imported and brought into the State of Florida from any foreign country shall be sold, offered for sale or used in the State of Florida, until the same has first been inspected by the State Road Department and a tag or other evidence showing such inspection shall be affixed to said cement, or the container thereof, showing that it has been so inspected or approved; and it shall be unlawful for any person, firm association of persons or corporation to sell, offer for sale or use in the State of Florida, any cement imported or brought into the State of Florida from any foreign country before such inspection has been made by the State Road Department and such cement approved as herein set out and until there has been paid an inspection fee to the State Road Department of fifteen cents (15¢) on each one hundred pounds or fraction thereof; said fee so required to be paid for inspection of cement manufactured in a foreign country and imported and brought into the State of Florida shall be paid to the State Road Department and said inspection fee is required to be paid as inspection fees on cement imported and brought from foreign countries into the State of Florida.

[fol. 9] Section 3. The State Road Department is hereby authorized to employ all field and other agents and clerical assistance at such times and periods as may enable it to enforce the provisions of this Act, and is hereby authorized to fix their compensation and the said State Road Department is hereby authorized to purchase and install such facilities from time to time as it may deem necessary to make fully effectual the provisions of this act, The State Road Department shall use and expend in enforcing this act only monies derived and collected hereunder.

Section 4. Said State Road Department is hereby authorized and empowered to promulgate any and all reasonable rules and regulations that it may deem necessary and proper

for the proper administration and enforcement of this Act and said rules and regulations shall have the force and effect of law.

Section 5. It shall be unlawful for any person to obstruct or resist any authorized agent or inspector designated by the State Road Department while such person is in the performance or discharge of any duty imposed upon, authorized or required under the provisions of this act, or by any rule or regulation adopted as provided hereunder.

Section 6. Any person who shall violate any of the provisions of this Act or shall do or commit any act herein declared to be unlawful or violate any rule or regulation made or promulgated by the State Road Department by virtue of the authority herein, shall be punished by a fine of not more than $2500.00, or imprisonment in the county jail for not more than 12 months, or both in the discretion of the court.

Section 7. This law shall be construed as an Act intending to secure public safety of the people of the State of Florida.

Section 8. The State Road Department is hereby authorized to designate and utilize the services of the several officers and inspectors of the Health Department, Hotel Commission of the State of Florida, as well as any and all other duly authorized and legally constituted officials who are vested with police power, in order to enforce and carry out the provisions of this Act in all particulars, and it shall be the duty of all such inspectors and other officials to com- [fol. 10] ply with the orders and requests of said Road Department in connection with the enforcement of this Act, without any additional compensation than that already being paid such inspector or officials, and refusal so to do on the part of any inspector or official shall constitute legal and sufficient grounds for removal from office.

Section 9. In addition to other remedies provided for in this Act, the State Road Department is hereby authorized to proceed in any of the courts of this State by injunction to restrain any threatened continued violation of this Act, and it shall be the duty of each State Attorney, County Prosecuting Attorney and of the Attorney General, to assist in the enforcement of the provisions of this Act upon request of the State Road Department.

Section 10. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

Section 11. This act shall take effect upon its becoming a law.

[fol. 11] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF A. B. HALE—Filed November 9, 1937

Personally came before me the undersigned officer, duly authorized to administer oaths, A. B. Hale, who being first duly sworn deposes and says that he is one of the Respondents named in the above styled cause, and is Chairman of the State Road Department of the State of Florida; that deponent has caused an investigation to be made for the purpose of determining what the cost will be for conducting and carrying out the inspection of cement manufactured in foreign countries and imported in Florida as provided for in the Act of the 1937 session of the Florida Legislature, known as Senate Bill No. 760, and which is under attack in the above styled proceeding; that such investigation shows, and it is the opinion of the deponent that 15¢ per hundred pounds as levied and provided in said Act as the inspection fee will be absolutely necessary to defray all of the expenses incident, essential and necessary to conduct and carry out the inspection as provided in said Act. That up to the present time, said Act has not been put in operation and said Act will not be put in operation until peremptory mandamus is issued in the Supreme Court of Florida in the mandamus proceedings pending in said Court involving said Act.

Arthur B. Hale.

Sworn to and subscribed before me this 8th day of November A. D. 1937. Geraldine Lesley, Notary Public State of Florida at Large. My commission expires Feb. 28, 1941. (Official Seal.)

[fol. 12] On the 9th day of November A. D. 1937, the defendants filed a certified copy of the pleadings and opinion of the Supreme Court of Florida, in the case of State of Florida, ex Rel. Florida Portland Cement Company, a cor-

poration, vs. A. B. Hale, as Chairman, et al., in the words and figures following, to wit:

IN SUPREME COURT OF FLORIDA

ORDER OF ALTERNATIVE MANDAMUS

State of Florida to A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brocks W. Bateman and James W. Perkins, as and Constituting the State Road Department of the State of Florida:

Whereas, the State of Florida, upon the relation of Florida Portland Cement Company, a corporation, as relator, has filed its petition for mandamus in the Supreme Court of the State of Florida, and alleges in said petition

First. That relator is a resident and taxpayer of the State of Florida, with its home office located at Tampa, and is engaged in the State of Florida in the business of manufacturing and selling cement for use in the State of Florida in the construction of dwellings, apartment house-, hotels, public buildings, etc., and

Second. That the respondents, A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James E. Perkins, as members, constitute the State Road Department of the State of Florida;

Third. That at the 1937 session of the Legislature there was duly, legally and regularly introduced and passed in accordance with the Constitution of Florida, in the Senate of said State, a bill providing for the establishment in Florida of a minimum standard for all cement offered for sale, sold or used in the State of Florida, requiring that the State Road Department inspect all cement imported and [fol. 13] brought into the State of Florida from any foreign country and requiring the State Road Department to collect an inspection fee for the inspection of all cement imported and brought into the State of Florida from any foreign country and offered for sale, sold or used in the State of Florida; providing penalties for the violation of any of the provisions of said act, etc., a copy of which is attached to said petition; that said bill was duly, regularly and legally passed by the Senate, having been passed in accordance with all requirements of law and the constitution.

Fourth. That said bill, after its passage by the Senate was immediately thereafter duly, regularly and legally certified and transmitted from the Senate to the House of Representatives of the State of Florida, in a Senate message addressed to said House in the due, regular and legal manner; that thereafter the House of Representatives of the State of Florida duly, regularly and legally passed said bill in accordance with the requirements of law and the Constitution; that all of the proceedings and actions taken by both the Senate and House of Representatives appear of record as entered in the Journals of the respective bodies and said entires show that said bill was legally and constitutionally adopted and passed by both of said bodies; that after its adoption and passage by the House, said bill was duly and properly enrolled and was duly, regularly and legally signed by the President of the Senate, as well as the Secretary of said body, and also by the Speaker of the House of Representatives and the Clerk of said body.

Fifth. That said bill, after being thus duly, regularly legally and constitutionally passed, adopted, enrolled and signed, the same was ful-y, legally and regularly, as provided in the Constitution, presented to and laid before the Honorable Fred P. Cone as Governor of the State of Florida on the 30th day of May A. D. 1937, while both Houses were in session.

[fol. 14] Sixth. That thereafter, to wit: on the 2nd day of June A. D. 1937, upon motion made by a Senator for that purpose, the Senate voted to recall said bill from the Governor; that after the adoption of said motion and on the same day, the Senate voted to return said bill to the Governor without having taken any action on the bill whatsoever, and that said bill was immediately in compliance with said vote of the Senate, returned to the Governor.

Seventh. That thereafter, to wit, on the 3rd day of June, A. D. 1937, the House of Representatives adopted a motion to recall said bill from the Governor's office; that on the 4th day of June A. D. 1937, being the same day on which said Legislature adjourned, sine die, the Governor returned said bill to the House of Representatives just prior to its adjournment; that the House took no action upon said bill whatsoever after the same was returned to it by way of amendment, reconsideration or otherwise, as disclosed by

the official Journal of said House; that said bill was in the possession and custody of the said House at the time of the adjournment of the Legislature sine die and the same was immediately transmitted and delivered as required by Section 16 Compiled General Laws of 1927, as well as by Article 4, Section 21, of the Constitution, by the Speaker of the House of Representatives to Honorable R. A. Gray as Secretary of the State of Florida, and that said bill has ever since said time been deposited and on file with said Secretary of State, and still is; that the said Honorable R. A. Gray as Secretary of State immediately notified the Honorable Fred P. Cone, as Governor, that said Act had been deposited with and was on file in his office and stated to the said Governor that if he desired said bill for any purpose he could secure the same by sending for it.

Eighth. That the Governor of Florida has never vetoed said Act and that the time within which he could exercise the right of veto has long since lapsed and that said Act [fol. 15] is and constitutes a valid enactment of the Legislature and is in full force and effect as a law of the State of Florida; that the Act of the House of Representatives in acting separately and alone in adopting the motion to recall said Act from the Governor and without any further action thereon, and the Governor's act in complying with said request of the House of Representatives was and is a nullity and did not in any wise affect the validity of said Act, particularly so when the Senate did not concur in said Act but on the contrary when it affirmatively appears that the Senate refused to concur in the recall of said Act by the House. The House was without authority to recall said bill without the concurrence of the Senate and especially where the Senate had positively and affirmatively refused to concur or agree to such recall as shown by the official Journal of the Senate.

Ninth. That notwithstanding the fact said Act constitutes a valid and constitutional enactment of the Legislature and is a valid law of the State of Florida, and notwithstanding the fact that said Act makes it the mandatory duty of the State Road Department to inspect all cement manufactured in a foreign country and imported from such country into Florida and offered for sale, sold or to be used in Florida, and collect a fee for such inspection, the respondents have refused and are still refusing and will continue to refuse

to enforce said Act unless required so to do by this Honorable Court, assigning as their reasons for so doing that said Act was not properly and constitutionally passed by the Legislature by reason of the matters and things hereinabove set out and respondents have assigned the additional reason for their refusal to enforce the same that said Act is unconstitutional because it levies a duty or impost upon foreign cement and is excessive and discriminatory.

Tenth. That there is absolutely no merit or legal justification whatsoever for the refusal of respondents to enforce said Act; that said Act was duly, legally and constitutionally passed and enacted and is duly, constitutionally [fol. 16] and legally the law of Florida and that the Legislature was authorized and empowered to enact said law under Article 2, Section 10 of the Constitution of the United States, which specifically gives to the State the right to impose or levy any imposts or duties on imports or exports, so long as the moneys derived therefrom are used for inspection purposes and any surplus left over shall be for the use of the Treasury of the United States, and such laws shall be subject to the revision and control of the Congress of the United States; so that the Legislature was vested with full authority to enact said law and relator alleges that the amount of impost or duty levied under the provisions of said Act of 15¢ per 100 pounds will be absolutely necessary to enforce and carry out the inspection of foreign manufactured cement imported into Florida as provided in said Act, and that no surplus will be derived from the imposition and collection thereof, but in the event a surplus should exist it will be held for the benefit of and turned over to the Treasury of the United States, and if it should later develope that said law should be revised, that is the exclusive function under the Constitution of the United States of Congress, and not of either the courts or the State Road Department of the State of Florida.

Eleventh. That the cement manufactured by relator in the State of Florida is being subjected to an inspection by the State Road Department under requirements and regulations in existence prior to the enactment of the law attached hereto, and that the relator's cement is required to conform to the standard prescribed by said Act attached hereto but that the State Road Department is refusing to

inspect cement manufactured in foreign countries which is imported into Florida and sold or used in Florida, notwithstanding said law mandatorily requires such inspection, and the State Road Department in its refusal to comply with the provisions of said law is permitting foreign manufactured cement to be sold and used in Florida which does not measure up to the minimum standard as prescribed and required by said Act.

[fol. 17] Wherefore, relator prays that this Honorable Court do issue its alternative mandamus directed to the respondents, A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, requiring said respondents to show cause if any they can, on a day to be fixed by this Court, why this Honorable Court should not issue a peremptory mandamus requiring respondents as the State Road Department to inspect all cement imported into the State of Florida from any foreign country and sold, offered for sale, or to be used in the State of Florida, and affix thereto evidence showing that said cement has been so inspected and collect therefor the inspection fees fixed in said Act, as the same is on file and deposited with the Secretary of State, as well as carry out, perform and discharge all of the other provisions required under said Act to be done and performed by the said State Road Department.

This is, therefore, to command you, A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, and each of you, to be and appear before the Supreme Court of Florida, at Tallahassee, on the — day of ——, A. D. 1937, at 10 o'clock A. M., and then and there show cause, if any you can, why peremptory mandamus should not issue as prayed.

Witness the Honorable W. H. Ellis, Chief Justice of the Supreme Court of the State of Florida, and the seal of said court.

(Signed) G. T. Whitneld, Clerk. (Seal of Court.)

(Said Bill # 760 of 1937 Legislature of the State of Florida, is omitted for the reason that same appears in this record on pages 7 to 10, inclusive.)

[fol. 18] IN SUPREME COURT OF FLORIDA

DEMURRER

Now comes respondents, A. B. Hale, as Chairman, and E. A. McColksey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, and demur to the alternative mandamus issued by the Court in the above cause, and say that the same is bad in substance and insufficient in law and assign the following as grounds of demurrer intended to be argued to the Court.

First. That said alternative mandamus shows upon its face that the bill, which is made the basis of this action, did not legally and constitutionally become a law of the State of Florida and is not effective as a law.

Second. It affirmatively appears that said bill was not presented to the Governor by the Legislature pursuant to the mandatory provisions of Section 28, Article 3 of the Constitution of Florida.

Third. For aught that appears in the Alternative Writ it was within the discretion of the Governor as a matter of courtesy to return a bill, not yet a law, to one of the branches of the Legislative Department, and said bill not thereafter being returned or presented to the Governor by the Legislature, or by one of the branches thereof, during the Legislative Session, results in said bill not being presented to the Governor as required by Section 28, Article 3 of the Constitution.

Fourth. Regardless of antecedent circumstances the fact remains by the language of the alternative writ itself that at and before the adjournment of the Legislature said bill was in the custody and possession of the House of Representatives, and was not returned or presented to the Governor during the Session or at any time thereafter; but on the contrary was filed with the Secretary of State the same as other Legislative papers pursuant to Section 116, C. G. L. 1927.

Fifth. It affirmatively appears that these proceedings amount to an attempt to use the power of the Courts to declare a bill to be enacted into law in the face of cricumstances indicating that the Legislative Department had acted while

in Session to prevent the bill from becoming a law by with-
[fol. 19] drawing it entirely from Executive consideration.

Sixth. For aught that appears in writ it is within the discretion of the Governor, and such discretion is not within the control of the Courts, to return a bill not yet a law to one of the branches of the Legislative Department for further disposition.

Seventh. That said alternative writ of mandamus shows upon its face that said purported Act is unconstitutional for the reason that it is a levy by the State of an impost or duty upon a product imported into Florida from a foreign country, and the exclusive right to levy duty or impost is vested under the Constitution of the United States in the Congress.

Eighth. Said purported Act sought to be enforced as law is unconstitutional for the further reason that it is discriminatory in that it imposes an impost or duty in the form of inspection fees upon imported cement from foreign countries and does not require the payment of any inspection fees on domestic cement.

Ninth. The title of said bill violates Section 16, Article 3, of the Constitution of Florida in that it contains more than one subject and matters properly connected therewith, viz; (1) fixes a minimum standard on all cement offered for sale in the State of Florida regardless of where manufactured, and (2) levies an impost or duty on all cement brought into the State from any foreign country and offered for sale in the State.

Tenth. Said bill arbitrarily interferes with the right to contract.

Eleventh. It affirmatively appears that the bill sets up no reasonable basis for fixing minimum standards for cement.

Twelfth. Said bill is discriminatory and violates Section I, Article XIV, Constitution of the United States in that it provides for inspection of foreign cement only.

Thirteenth. It manifestly appears that said bill tends to create a monopoly.

[fol. 20] Fourteenth. It affirmatively appears that the allegations of the alternative writ fail to show a clear legal duty which respondents may be compelled to perform.

(Signed) Fred H. Kent, Attorneys for Respondents.
State Road Department of Florida, (Signed) by Arthur B. Hale, Chairman.

I, the undersigned attorney for respondents in the above cause, do hereby certify that in my opinion the foregoing demurrer is well founded and grounded in point of law.

(Signed) Fred H. Kent, Attorneys for Respondents.

IN SUPREME COURT OF FLORIDA

AMENDMENT TO RESPONDENTS' DEMURRER

Come now the Respondents and amend their Demurrer filed herein by adding thereto the following ground:

Fifteenth: The alternative writ shows on its face that Relator is not entitled to the peremptory writ prayed for.

(Signed) Richard P. Daniel, Attorney for Respondents.

IN SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1937

Tuesday, October 12, 1937

Original Jurisdiction Mandamus

ORDER OVERRULING DEMURRER, ETC.

This cause having been submitted to the Court upon the Demurrer of the Respondent to the Alternative Writ of Mandamus and upon Motion of Respondents to quash the Alternative Writ of Mandamus and upon briefs and argument of counsel for the respective parties and the Court being now duly advised in the premises, it is thereupon ordered and adjudged by the Court that the said Demurrer be overruled and that the said Motion to Quash the Alternative Writ be and it is hereby denied; it is further ordered by the Court that the Respondents be allowed ten days from

this date in which to file Answer or Return, in default of which Peremptory Writ will issue.

The Opinion of the Court in this cause prepared by Mr. [fol. 21] Justice Buford, was this day ordered to be filed.

IN SUPREME COURT OF FLORIDA, DIVISION A, JUNE TERM A. D. 1937

A case of original jurisdiction-mandamus.

Whitaker Brothers, for Relator;
Richard P. Daniel and Fred H. Kent, for Respondents.

OPINION—Filed October 12, 1937

BUFORD, J.:

This is an original proceeding in mandamus. Alternative writ was issued on July 27, 1937, to which the respondents have filed demurrer, which will be considered as motion to quash. The purpose of the writ was to coerce the State Road Department of the State of Florida to comply with the provisions of Senate Bill #760, which became a law when it was filed in the office of the Secretary of State on June 5, 1937. We quote the legislative act in full for the benefit of the bench and bar, as follows: (Said Act #760 is Omitted by Reason of the Fact that it Appears Heretofore in this Record on Pages 7 to 10, Inclusive.)

The particular act sought to be required by the State Road Department is "to inspect all cement imported into the State of Florida from any foreign country and sold, offered for sale, or to be used in the State of Florida, and affix thereto evidence showing that said cement has been so inspected and collect therefor the inspection fees fixed in said Act, as the same is on file and deposited with the Secretary of State, as well as carry out, perform and discharge all of the other provisions required under said Act to be done and performed by the said State Road Department." The language, "as well as carry out, perform and discharge all of the other provisions required under said Act to be done and performed by the said State Road Department" may be treated as surplusage because we hold that the Act only requires the State Road Department "to inspect all

cement imported into the State of Florida from any foreign country, and sold, offered for sale, or to be used in the State of Florida, and to affix thereto evidence showing that [fol. 22] said cement has been so inspected, and to collect therefor the inspection fees fixed by said Act as the same is on file and deposited with the Secretary of State." The State Road Department is authorized by the Act to do certain things but the provisions of the Act in regard to those other things which may be done by the State Road Department are directory and not mandatory.

The first ground of the demurrer is:

"First. That said alternative mandamus shows upon its face that the bill, which is made the basis of this action, did not legally and constitutionally become a law of the State of Florida and is not effective as a law."

The record shows that this ground is without merit because each and every provision of Section 17 of Article III of the Constitution of Florida was complied with. The record shows, however, that after the Act had been duly passed by both the Senate and the House and had been authenticated as required by the Constitution, it was transmitted to the Governor as an Act of the Legislature; that thereafter, the Governor, pursuant to the request of the House of Representatives, returned the Act to the House of Representatives. For what purpose or reason is not discussed by the record.

The record further shows that the Act was in due course filed and deposited with the Honorable R. A. Gray as Secretary of State by the Honorable McL. Christie as Speaker of the 1937 Session of the House of Representatives of the State of Florida on the 5th day of June, 1937.

Section 28, Article III of the Constitution of Florida, provides as follows:

Every bill that may have passed the Legislature shall, before coming a law, be presented to the Governor; if he approves it he shall sign it, but if not he shall return it with his objections to the House in which it originated, which House shall cause such objections to be entered upon its Journal, and proceed to reconsider it; if, after such reconsideration, it shall pass both Houses by a two-thirds vote [fol. 23] of members present, which vote shall be entered on

the journal of each House, it shall become a law. If any bill shall not be returned within five days after it shall have been presented to the Governor (Sunday excepted) the same shall be a law, in like manner as if he had signed it. If the legislature, by its final adjournment prevent such action, such bill shall be a law, unless the Governor, within ten days after the adjournment, shall file such bill, with his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session, and if the same shall receive two-thirds of the votes present it shall become a law."

Courts of final appellate jurisdiction in this country are not in harmony in regard to the right of the legislature to recall an Act which has been duly passed and presented to the Governor. In some jurisdictions it is held that after a bill has passed both houses of the Legislature and has been sent to the Governor for approval, it is competent for the legislature to reconsider its vote on return of the bill to it from the Governor, at its request, such request being evidenced by a joint resolution to that effect. See Ensley v. Simpson, 166 Ala. 356, 52 Sou. 61, Robinson v. City of Ensley, — Ala. —, 52 Sou. 69.

In Baltimore Fidelity Warehouse Co. v. Canton Lumber Co., 118 Md. 135, 84 Atl. 188, it was held in effect that where a bill had passed both houses of the legislature and had been sent to the Governor for approval and was afterwards returned to one of the houses at its request in order that it might be amended, it was held that although the request for the return of the bill was not made by joint resolution of both houses of the legislature, the facts disclosed a concurrent action of both Houses in the request and that the legislature had jurisdiction to reconsider the bill. See also Teen v. State, 79 Texas Criminal Reports 285, 183 S. W. 1144; McKenzie v. Moore, 92 Ky. 216, 17 S. W. 483, 14 L. R. A. 251.

In other jurisdictions it has been held that the legislature could not even by joint resolution, recall and reconsider a [fol. 24] bill which has been sent to the Governor for approval and that even if the Governor should return the bill on request, the legislature has no power to reconsider it. See Wolfe v. McCaull, 76 Va. 876. In that case the court construed a constitutional provision to the effect that every bill passed by the Senate and House of Delegates and every

resolution requiring the assent of both houses of the Assembly shall, before becoming a law, be presented to the Governor and that if he shall approve it he shall sign it, but if not he shall return it, with his objections, to the House in which it originated which shall proceed to reconsider it, and that if the Governor shall not return it within five days after presentation to him it shall be a law.

The Court discussed the rules of the House of Representatives and the court held that where the Governor returned a bill without approval or veto for the purpose of reconsideration in obedience to a joint resolution recalling the bill before the expiration of the time allowed to the Governor for consideration the bill became a law after the expiration of such time without a veto. The Court said: "It is plain that the action of the Governor was a mere act of courtesy on the part of one coordinate branch of the Government toward another and was not intended and cannot be construed as a compliance with the requirements of the constitution, that if he did not approve it he should return it (the bill) with his objections to the House in which it shall have originated which shall enter the objections at large on their journal." And the Court further said "He (meaning the Governor) could not evade that duty, if he would, by allowing the legislature to recall the bill from his hands and to defeat by mere non-action a measure they have once declared with due solemnity to have passed."

To like effect is People v. Devlin, 33 N. Y. 269, 88 Am. Dec. 377.

In the instant case there was no joint action of the House and Senate asking a return of the bill from the Governor to either branch of the legislature and there was no action on the bill after its return to the House of Representatives by the Governor. It so happened that all these transactions transpired on the closing days of the legislative session and at the close of the session the Speaker of the House in due [fol. 25] course transmitted the bill to the Secretary of State showing its passage and authentication as hereinbefore stated.

We hold that neither the House of Representatives nor the Senate of the Legislature of Florida could by its independent resolution recall from the hands of the Governor a bill which had been duly passed by the legislature, had been authenticated and transmitted to the Governor for his con-

sideration, and that the action of the Governor in transmitting the bill to the House of Representatives in the instant case was a matter of courtesy and had no effect upon the validity of the act which had been duly and constitutionally passed and transmitted to him for his consideration.

The Second, Third, Fourth, Fifth, and Sixth grounds of the motion present the same question which we have just dealt with and it is neither necessary to quote the language used in such grounds nor to discuss either of them further, except to say that they are, under the state of the record, without merit.

The Seventh ground of the motion is as follows:

"That said alternative writ of mandamus shows upon its face that said purported Act is *Act is* unconstitutional for the reason that it is a levy by the State of an impost or duty upon a product imported into Florida from a foreign country, and the exclusive right to levy duty or impost is vested under the Constitution of the United States in the Congress."

This ground is untenable because the Act on its face shows that it does not purport to levy an impost or duty upon a product imported to Florida from a foreign country, but on the contrary it is shown that the fee required to be paid is an inspection fee to meet the expense incurred by the State in the enforcement of its inspection law. We may here revert to Article I, Section 10, paragraph 2, of the Constitution of the United States, which provides as follows:

"No State shall, without the consent of the Congress, lay any imposts or duties on Imports or Exports, except what may be absolutely necessary for executing its inspection [fol. 26] laws; and the net produce of all Duties and Imposts laid by any State on Imports or Exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress."

It will be observed that this provision of the Constitution reserves in the States the right to lay imposts or duties on the imports or exports which may be absolutely necessary for executing its inspection laws. But in reserving that power in the States it was provided in this section of the Constitution that the net produce of all duties and imposts

laid by any State on imports or exports shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of Congress. Therefore, if the amount levied in this Act to cover the expense of inspection should exceed the costs of such inspection, the net surplus must be accounted for to the Treasury of the United States.

It will be observed that this power reserved in the States applies only to inspection fees laid on imports and exports. It is well settled that the provisions of paragraph 2, Section 10, Article 1, of the Constitution applies only to articles imported from or exported to foreign countries. See New Mexico ex rel. McLean v. Denver and R. G. R. Co., 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78; Patapsco Guano Co. v. N. C. Board of Agriculture, 18 Sup. Ct. 862, 171 U. S. 345, 43 L. Ed. 191; Woodruff v. Parham, 75 U. S. 123, 19 L. Ed. 382; Pittsburgh & S. Coal Co. v. La, 156 U. S. 590, 15 Sup. Ct. 459, 39 L. Ed. 544.

In Patapsco Guano Co. v. N. C. Board of Agriculture, supra, the Supreme Court of the United States, speaking through M. Justice Fuller, referring to this clause of the Federal Constitution, said:

"The second clause of #10 of Article 1 of the Constitution reads: 'No State shall, without the consent of the Congress lay any imposts or duties on imports or exports, ex- [fol. 27] cept what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.''

The words 'imports' and 'Exports' as therein used have been held to apply only to articles imported from or exported to foreign countries. Woodruff v. Parham, 8 Wall. 123 (19:382); Pittsburgh & S. Coal Company v. Louisiana, 156 U. S. 590, 600 (39: 544, 549). The clause recognized that the inspection of such articles may be required by the States, and that they may lay duties on them to pay the expense of such inspections, but as it would be difficult if not impossible to determine the necessary amount with exactness and to remove any inducement to excess, it was provided that any surplus should be paid to the United States. As such laws are subject to the revision and control of

Congress, it has been suggested that whether inspection charges are excessive or not might be for Congress to determine and not the Courts, which would also be so where inspection laws operate on interstate as well as foreign commerce. Neilson v. Garza, 2 Woods 287; Turner v. Maryland, 107 U. S. 38 (27, 370). Considered as an inspection law and as not open to attack as in contravention of that clause, the questions still remain whether an inspection law can operate on importations as well as exportations; and whether in this instance the charge was so excessive as to deprive the act of its character as an inspection law or as a legitimate exercise of protective governmental power, and make it a mere revenue law obnoxious to the objection of being an unlawful interference with interstate commerce. Counsel for plaintiff in error insists that this result is deducible from the legislation of North Carolina making appropriations from the funds of the department of agriculture received from the charge on fertilizers or fertilizing materials; as also from the evidence submitted on the hearing.
[fol. 28] It will be more convenient to first dispose of the latter contention."

Then after citing various statutes of the State of North Carolina, it is said:

"Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a state."

In the case of New Mexico ex rel. McLean v. Denver and R. G. R. Co., supra, Mr. Justice Day, speaking for the Court said:

"As to the objection predicated on #10 of article 1, that section can have no application to the present case, as that provision directly applies only to articles imported or exported to foreign countries. Patapso Guano Co. v. Board of Agriculture, 171 U. S. 345, 350, 43 L. Ed. 191-193, 18 Sup. Ct. Rep. 862, and cases cited. Moreover, that paragraph of

the Constitution expressly reserves the right of the states to pass inspection laws, and if this law is of that character it does not run counter to this requirement of the Constitution. The Question principally argued is as to the effect of this law upon interstate commerce, and it is urged that it is in violation of the Constitution because it undertakes to regulate interstate commerce, and lays upon it a tax not within the power of the local legislature to exact. It has been too frequently decided by this Court to require the restatement of the decisions, that the exclusive power to regulate interstate commerce is vested by the Constitution in Congress and that other laws which undertake to regulate [fol. 29] such commerce or impose burdens upon it are invalid. This doctrine has been reaffirmed and announced in cases decided as recently as the last term of this court. Houston & T. C. R. Co. v. Mays, 201 U. S. 321, 50 L. Ed. 772, 26 Sup. Ct. Rep. 491; McNeil v. Southern R. Co., 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. Rep. 722. While this is true, it is equally well settled that a state or a territory for the same reasons in the exercise of the police power may make rules and regulations not confirming with the legislation of Congress upon the same subject and not amounting to regulations of interstate commerce. It will only be necessary to refer to a few of the many cases decided in this court holding valid enactments of legislatures having for their object the protection, welfare and safety of the people, although such laws may have an effect upon interstate commerce. Missouri K. & T. R. Co. v. Haber, 169 U. S. 613-635, 42 L. Ed. 878-885, 18 Sup. Ct. Rep. 488; Chicago M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. Rep. 289, Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132. The principle decided in these cases is that a state or territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority, by the legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce. In Patapsco Guano Co. v. Board of Agriculture, supra, it was directly recognized the state might pass inspection laws for the protection of its people against fraudulent practices and for the suppression of frauds, although such legislation had an effect upon interstate commerce. The same principle was recognized in

Neilson v. Garza, 2 Woods, 287, Fed. Cas. No. 10,091, a case decided by Mr. Justice Bradley on the circuit and quoted from at length with approval by Mr. Chief Justice Fuller in the Patapsco case."

So it appears that there is a clear distinction to be drawn between the rights of states to legislate insofar as inspection is concerned in regard to merchandise imported or exported [fol. 30] to or from a foreign country and the right of a state to legislate insofar as inspection is concerned in regard to merchandise in interstate commerce between the states. When legislating as to inspection of merchandise imported into the state from foreign countries the Constitution by the clause hereinabove referred to has reserved in the State specifically the power to legislate concerning the inspection of such merchandise so imported, but by the specific provision of the Constitution has made such laws subject to the revision and control of the Congress. The purpose of this provision was that the states might reserve the right to protect the health, property and welfare of its citizens but with the power lodged in the Congress of the United States to revise or control such legislation so that it would not unlawfully interfere with commerce between the nations.

Now it is clear that if the fee here involved constituted a tax levied for revenue, it would violate the Federal Constitution as above referred to. See Mulger v. Kansas, 131 U. S. 661, 31 L. Ed. 210; Minnesota v. Barber, 10 Sup. Ct. Rep. 862, 136 U. S. 313, 34 L. ed. 455, Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543; Voight v. Wright 11 Sup. Ct. Rep. 855; 141 U. S. 62, 35 L. Ed. 638; Brimmer v. Rebman, 11 Sup. Ct. 213, 138 U. S. 78, 34 L. ed. 862.

In many cases it has been held that the state in the exercise of the police power may make rules and regulations not conflicting with the legislation of Congress upon the same subject and not amounting to regulations of interstate commerce and enactments of legislatures have been held valid which have for their object the protection of the welfare and safety of the people; although such laws may have an effect upon interstate commerce. See Mo. K. & T. R. Co. v. Haber, 18 Sup. Ct. 488, 169 U. S. 613, 42 L. ed. 878, Chicago M. & St. P. R. Co. v. Solan, 18 Sup. Ct. 289, 169 U. S. 133, 42 L. ed. 688, Neilson v. Garza 2 Woods 287, Fed. Cas. No. 10,091.

In the light of the decisions, the provisions of the Constitution and the provisions of the Act under consideration,

we hold that it constitutes a valid inspection law; that the purpose of the act is for the safety and welfare of the consumer of commercial cement in the State of Florida.
[fol. 31] The Act sets up a standard which must be met and complied with in all cement sold in the State of Florida for the purpose mentioned in the Act. That standard is shown by the record to be the standard set up by the American Society of Testing Materials and approved by the United States Bureau of Public Roads for highway construction. It is made a criminal offense for any person, persons or association of persons, firm or corporation to sell, offer for sale or use in the State of Florida any cement in the construction of any hotel, apartment house, rooming house, dwelling or public building of any kind or character which does not measure up to the minimum standard fixed by the Act. The inspection of cement imported from foreign countries was deemed by the legislature to be necessary as a protection to dealers in Florida against having foisted on them a commodity which cannot be resold under the laws of Florida, and which, because of its inferior quality constitutes unfair competition in this commodity. In New Mexico ex rel. McLean v. Denver & R. G. R. Co., supra, in discussing the Act there under consideration it was said:

"It is argued that this act lays a special burden upon interstate commerce, because under the law, hides not offered for transportation are not required to be inspected after thirty days in slaughterhouses, and not at all outside of slaughterhouses. But legislation is not void because it meets the exigencies of a particular situation. Other statutory provisions apply to property remaining in the territory where possibly it may be found and identified. When shipped beyond the limits of the territory the means of reaching it are beyond local control, and it is the purpose of ## 3 to 4 of the Act of 1901 to preserve within the territory a record of the brands identifying the property and naming the purchaser or shipper. Certainly we cannot judicially say that there can be no valid reason for making the inspection in question apply only to hides offered for transportation beyond the territory, and that for that reason the tax [fol. 32] is an arbitrary discrimination against interstate traffic."

It is just as certain that we cannot judicially say that there can be no valid reason for making the inspection here

under consideration apply only to cement imported into the State of Florida from a foreign country and that for that reason the inspection and fee incident thereto is arbitrary discrimination against commerce between the nations.

The Eighth ground of demurrer is as follows:

"Eighth. Said purported Act sought to be enforced as law is unconstitutional for the further reason that it is discriminatory in that it imposes an impost or duty in the form of inspection fees upon imported cement from foreign countries and does not require the payment of any inspection fees on domestic cement."

What has been said above is sufficient to dispose of this ground.

The Ninth ground of the demurrer, that the Act violates Section 16 of Article 3 of the Constitution of Florida in that it contains more than one subject and matters properly connected therewith, is without merit.

The Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth grounds of demurrer are as follows:

"Tenth. Said bill arbitrarily interferes with the right to contract.

Eleventh. It affirmatively appears that the bill sets up no reasonable basis for fixing minimum standards for cement.

Twelfth. Said bill is discriminatory and violates Section I, Article XIV, Constitution of the United States in that it provides for inspection of foreign cement only.

Thirteenth. It manifestly appears that said bill tends to create a monopoly.

Fourteenth. It affirmatively appears that the allegations of the alternative writ fail to show a clear legal duty which the respondents may be compelled to perform.

Fifteenth. The alternative writ shows on its face that Relator is not entitled to the peremptory writ prayed for."

[fol. 33] We think that what we have heretofore said sufficiently states reasons for disposing of these latter grounds of demurrer adversely to the contentions of the Respondents.

While the question has not been presented by either of the respective parties, it has been suggested that the Respondents may not be heard to question the validity of the Act on authority of the opinion and judgment in the case of State ex rel. A. C. L. R. R. Co. v. Board of Equalizers of Florida, 84 Fla. 592, 94 Sou. 681.

In the case of State ex rel. A. C. L. R. R. Co. v. Board of Equalizers of Florida, supra the court refers to the case of Board of Public Instruction of Santa Rosa County v. Croom, et al., reported 57 Fla. 347, 48 Sou. 641, and says:

"The case of Board of Public Instruction for Santa Rosa County v. Croom, 57 Fla. 347, 48 South. Rep. 641, is not in conflict with the doctrine herein announced. In that case Mr. Knott's interest was directly affected. He was State Treasurer, and under a heavy bond. If he paid money out of the Treasury under the provisions of an unconstitutional Act, he or his bondsman would have had to bear the loss. His right to raise the question of the constitutionality of the Act involved did not grow out of the obligation of his oath of office, nor out of his official position, but because he was liable to be injured pecuniarily."

There is no material difference between the status of the State Road Department in the instant case and the status of Mr. Croom as Comptroller and Mr. Knott as State Treasurer in that case. If the State Road Department complied with the mandatory provision of the Act, the members of that department would be required to pledge or expend public funds in so doing and while if the Act should be enforced and should be held valid the fund pledged or expended would ultimately come from those paying the inspections fees, such fact does not place the State Road Department in such position that it is required to expend public money pursuant to provisions of a legislative Act which it in good faith believes to be invalid and unenforceable. The [fol. 34] Act here under consideration is of such a nature that its constitutionality may have well been, and in good faith, doubted. One who is required to pay out public funds should be at least reasonably certain that the same are paid out under valid law. See State of Fla. ex rel. Harrell et al. as Board of County Commissioners of Washington County, Fla. and C. W. Nelson vs. Fred P. Cone et al. as Board of Administration of State of Florida, J. M. Lee as Comptroller and Secretary of Board of Administration, W. V. Knott as

State Treasurer and County Treasurer ex officio of Washington County, filed at this Term of the Court. See also State ex rel. Neville, 123 Fla. 745-167 So. 650. Coppedge et al. vs. State, 99 Fla. 358, 127 So. 319.

The above enunciation is sound, although we recognize the rule to be that before any legislative Act can be judicially declared unconstitutional, its repugnance to the Constitution must be clearly shown and to the exclusion of all reasonable doubt.

It, therefore, follows that while the reasonable doubt of the constitutionality of a legislative Act may justify an officer charged with the duty of expending public funds only pursuant to valid law, in declining in the absence of a controlling court order, to pay out public funds under provisions of such a doubtful statute, such a reasonable doubt will not justify a court in striking down the Act as being unconstitutional.

For the reasons stated, the demurrer and motion to quash is denied and respondents are allowed ten days within which to file an answe. or return, in default of which peremptory writ will issue.

Ellis, C. J., and Terrell, J., concur.

Whitfield, P. J., and Brown and Chapman, J. J., Concur in the opinion and judgment.

[fol. 35] IN SUPREME COURT OF FLORIDA

PETITION FOR LEAVE TO APPEAR AS AMICUS CURIAE

To the Honorable Justices of the Supreme Court of the State of Florida:

Come now R. R. Saunders and Dwight L. Rogers, members of the Bar of this Court, on behalf of and in the instance and request of the Broward County Port Authority, a public corporation of the State of Florida, and respectfully prays the Court for permission to file a petition for a re-hearing in said cause to appear as amicus curiae in the above entitled cause, a petition for re-hearing having heretofore been filed by the Respondents herein by delivering the same to the Judges of this Honorable Court, and shows to the Court as follows, to wit:

1. That the Broward County Port Authority is a public corporation created by an Act of the Legislature of the State

of Florida, is pecuniarily and economically interested in the outcome of this legislation and the question raised by the pleadings in said cause.

That manifest and manifold discriminations will result to the Broward County Port Authority and to the merchants and taxpayers of the Broward County Port District by the imposition of the tax designated as an inspection fee and will also effect the contractors and the builders in said District by increasing the purchase price of cement by at least Three ($3.00) Dollars a ton and shall otherwise be a detriment to the citizens and businesses of said community and said Port District.

Your Petitioners will further show that heretofore the Court has rendered a decision in this cause but your Petitioners, as amicus curiae and as representing the interests of the Broward County Port Authority and the tax payers in said District respectfully show to the Court in the judgment rendered it overlooked or failed to consider pertinent and vital matters in harmony with the position taken by the Respondents in their brief and their argument before your Honorable Court.

2. In holding that said Act does not violate the Commerce Clause of the Federal Constitution (Article 1, Sec. 8), this Court overlooked and failed to consider that this Act does not require any inspection or levy any inspection fee upon any cement manufactured and sold and used in the State of [fol. 36] Florida, or *or* imported into Florida from any other State of the United States. But said Act only provides for the inspection and payment of fees with respect to cement imported into the State of Florida from a foreign country. And this Court also overlooked and failed to consider that the Supreme Court of the United States has held in Voight vs. Wright, 141 U. S. 68, 35 L. Ed. 683, and other cases, that a State may not under the guise of exercising its police powers or of enacting inspection laws, discriminate against the products and industries of some of the States in favor of the products and industries of its own and other States, and that a Statute that prevents products of distant States from coming into competition upon terms of equality with products of a domestic State, is repugnant to the Constitution of the United States. That any local regulation which in terms or by its necessary operation denies this equality in the markets of a State is,

when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void.

This Court further overlooked and failed to consider that the Federal Constitution grants the Congress of the United States the power to regulate commerce with foreign nations in precisely the same language as it does commerce among the States. That if a State Statute injuriously discriminating against the products of another State of the Union is forbidden by the Constitution, then a similar State Statute discriminating against goods imported from a foreign Country is equally forbidden. Cook vs. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015.

3. This Court further overlooked or failed to consider that this Act before the Court nowhere provides for any inspection of cement manufactured, in Florida or anywhere else in the United States. The portion of said Act providing for a minimum standard for all cement offered for sale or sold or used in Florida, and its provision that it shall be unlawful to sell or offer for sale or use in Florida any cement which does not measure up to said minimum standard, makes no provision whatever for inspection of such cement. Furthermore, it provides for no levy of any [fol. 37] inspection fee whatever upon such cement. This Court further overlooked and failed to consider that the foregoing minimum standard provisions of said Act, as far as they go apply with equal force and effect to cement imported into Florida from a foreign country, but the further provisions in said Act for the inspection and license fees affecting cement imported from a foreign country into Florida, do not apply with equal force and effect, or apply at all, to cement manufactured in Florida or imported into Florida from any other State in the United States.

Therefore, the Court has overlooked and failed to realize that said Act lays a burden on cement imported into the State from a foreign country that is not laid upon cement manufactured in Florida or imported from any State of the Union, and that such a discriminatory burden violates said section of the Federal Constitution.

4. This Court in citing in its opinion Voight vs. Wright, 141 U. S. 68, 35 L. Ed. 638, and Brimmer vs. Rebman, 138

U. S. 78, 34 L. Ed. 862, misunderstood and overlooked the sole ground upon which said cases were decided by the United States Supreme Court. This Court cited said cases in support of the proposition that State may not levy an inspection fee as a revenue measure.

This Court therefore overlooked ' .e Statute involved in Voight vs. Wright laid no inspe..on fee for revenue. But on the contrary, the fee was laid entirely for inspection purposes. The sole issue raised and decided by the United States Supreme Court in that case was that since the Statute required the inspection only of flour imported into the State of Virginia, and did not require similar inspection of flour manufactured domestically, it constituted a burden on commerce, contrary to the Federal Constitution.

Furthermore, Brimmer vs. Rebman also cited in this Court's opinion, established and applied the same, identical principle. And this Court overlooked and failed to consider, for aught its opinion shows, the application of said principle and rule to the case at bar.

[fol. 38] Your Petitioners respectfully say that the Court overlooked the fact that this inspection fee is tantamount to a tax or duty laid upon a commodity in order to throttle competition with a domestic corporation and as illustrative of this fact Petitioners show that recently a shipment of cement was unloaded at Port Everglades in the Broward County Port District, consisting of Sixty thousand (60,000) sacks containing One hundred (100) pounds each and that this inspection fee of Three ($3.00) Dollars per ton would aggregate the sum of ($9,000.00) Nine Thousand Dollars, when as a matter of fact the actual cost of inspection under the largest cost possible for a thorough inspection did not exceed Two hundred Twenty-five ($225.00) Dollars (The cost being approximately one fortieth (1/40) of what the tax required under this Act).

Therefore, Petitioners pray that this Petition be filed and pray the Court for ten (10) days time in which to file the brief in said cause for the information and convenience of the Court.

Respectfully submitted, (Signed) Dwight L. Rogers,
R. R. Saunders, as Amicus Curiae.

In Supreme Court of Florida

Petition for Leave to Appear as Amicus Curiae, etc.

To the Honorable Justices of the Supreme Court of the State of Florida:

Comes now Philip D. Beall, a member of the Bar of this Court on behalf and at the instance of the Chamber of Commerce of Pensacola, Florida, a corporation, and respectfully prays the Court permission to appear as amicus curiae in the above entitled cause, in which petition for rehearing has been filed, and shows unto the Court:

1

That manifest and manifold discriminations will result to the Port of Pensacola and the merchants of this City dealing in cement by the imposition of the tax designated "inspection fee" in the Act in question, interfering thereby in the usual and ordinary commerce of the City and Port of Pensacola, to the detriment of the citizens and businesses of said community, in that:

[fol. 39] (a) Large quantities of said commodity are purchased and brought into said City, and thereafter sold and distributed in interstate commerce to persons in adjoining states, in competition with dealers in such states, which dealers importing cement through ports of other states, do so without the handicap of an inspection fee.

(b) That due to the close proximity of this community to ports of other states, such commodities might be imported through other ports in other states and shipped into this State, without the payment of the tax under the guise of an inspection fee set forth in the Act.

(c) That such tax under the guise of an inspection fee in fact renders prohibitive competition with merchants not required to pay such tax.

(d) That said Act is unfair, unjust and unreasonable to the industry, in that no inspection is provided for cement other than that specifically described in the Act as imported cement, showing thereby on the face of the Act that same is not in fact a "pure cement" law. Whereby this com-

munity is deeply interested and seriously affected by such Act.

Petitioner having hereinabove shown the interest of the Chamber of Commerce and the community in the cause, respectfully shows unto the Court that:

(a) Said Act is not such an Act as that considered by the Court in Patapasco Guano Company vs. Board of Agriculture, 181 U. S. 346-361 43 L. Ed. 191 (North Carolina-fertilizer case). Such case plainly provided for the inspection of all fertilizers and a uniform fee for the inspection of all kinds, whether imported or domestic, or from other States, but is a statute similar to that construed in Voight vs. Wright, 141 U. S. 62, 35 L. Ed. 638 (the Virginia flour inspection Act), which was held unconstitutional because it required the inspection of flour from other states when no such inspection was required of flour manufactured in Virginia. The Court stating in the fertilizer case that such fertilizer statute is not open to such objection "for the inspection and payment of its costs are required in respect of all fertilizers, whether manufactured in the State or out of it.

[fol. 40] Wherefore, the Court overlooked or failed to consider the legal effect of such opinions, and that:

(a) The Florida Cement Act does not require an inspection of or levy an inspection fee upon any cement manufactured and sold and used in the State of Florida, or imported into Florida from any other State of the United States. But only provides for an inspection and payment of fees with respect to cement imported into the State of Florida from a foreign country.

(b) That such Act, therefore, is identical in its imperfections with that of the Virginia flour statute held invalid in the Voight case above, and the previous Supreme Court case of Brimmer vs. Rebman, 138 U. S. 78, 34 L. Ed. 862. (The Virginia meat inspection Act).

Respectfully, Philip D. Beall, Amicus Curiae.

IN SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1937

ORIGINAL JURISDICTION MANDAMUS

STATE OF FLORIDA ex Rel. Florida Portland Cement Company, a Corporation, Relator,

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, Brooks W. Bateman and James W. Perkins, as and Constituting the State Road Department of the State of Florida, Respondents

CLERK'S CERTIFICATE

I, G. T. Whitfield, Clerk of the Supreme Court of Florida, do hereby certify that on the 29th day of July, 1937, petition for mandamus was duly filed in said Supreme Court by State of Florida ex rel. Florida Portland Cement Company, a corporation, Relator, against A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, Respondents; that thereafter based upon said petition the Supreme Court of Florida did on the 29th day of July 1937, issue and grant its Alternative Writ of Mandamus directed to said respondents, a copy of said Alternative Writ of Mandamus as issued by said Supreme Court being hereto attached marked Exhibit "A", and thereafter the Respondents in compliance with and obedience to said Alternative Writ of Mandamus filed their Demurrer or Motion to Quash said Alternative Writ of Mandamus copy of the Demurrer or Motion to Quash as filed by the Respondents in said Supreme Court is hereto attached marked Exhibit "B".

[fol. 41] I Further Certify that thereafter Briefs were duly filed on behalf of the Relator as well as Respondents and said cause was duly orally argued before the Supreme Court of Florida and the Supreme Court of Florida did on the 12th day of October 1937, hand down its decision, judgment and Opinion overruling and denying said demurrer or motion to quash filed by the Respondents, copy of said decision, judgment and opinion in said Supreme Court of Florida being hereto attached marked Exhibit "C"; that thereafter the Attorney representing the Respondent in said

cause filed a petition for rehearing and subsequently Respondents filed praecipe for withdrawal of said petition for rehearing which petition and said praecipe are pending before the Supreme Court of Florida undisposed of; that on November 1, 1937, R. R. Saunders and Dwight L. Rogers, members of the Bar of this Court, on behalf of and in the instance and request of the Broward County Port Authority, a public corporation of the State of Florida, and Philip D. Beall, a member of the Bar of this Court, on behalf and at the instance of the Chamber of Commerce of Pensacola, Florida, a corporation, filed petitions to intervene in said proceeding and also filed petitions for rehearing in said cause all of which said petitions are pending before the Supreme Court of Florida at the present time undisposed of.

And I Further Certify that the papers hereto attached are true and correct copies of the originals as the same are on file in my said office as Clerk of the Supreme Court of the State of Florida.

Witness my hand and the seal of the Supreme Court at Tallahassee, Florida, this 8th day of November, A. D. 1937.

G. T. Whitfield, Clerk of the Supreme Court of Florida. (Seal.)

[fol. 42] In Supreme Court of Florida, June Term, A. D. 1937

State of Florida,
County of Leon, ss:

I, William H. Ellis, Chief Justice of the Supreme Court of Florida do hereby certify that G. T. Whitfield, is Clerk of said Supreme Court of the State of Florida and that he is the custodian of and has in his possession all papers, documents and records filed in all cases and proceedings pending before said Court.

In Testimony Whereof, I have hereunto subscribed my name and caused to be affixed the seal of said Supreme Court at the City of Tallahassee, in said county and state, this 8th day of November, A. D. 1937.

W. H. Ellis, Chief Justice of the Supreme Court of the State of Florida. (Seal.)

[fol. 43] IN UNITED STATES DISTRICT COURT

ORDER DENYING TEMPORARY RESTRAINING ORDER—NOV. 9, 1937

This cause coming on this day to be heard on the application of the plaintiff for entry of temporary restraining order to restrain the inspection provisions of the Act of the Legislature of the State of Florida, known as Senate Bill 760 of the year 1937, and it appearing that due notice thereof has been given and that all parties are present by counsel, now therefore, upon consideration thereof, it is:

Ordered, Adjudged and Decreed that upon the affidavit of the Chairman of the State Road Department and the statement of counsel that no effort will be made to enforce the inspection provisions of said Senate Bill No. 760 until after November 26, A. D. 1937, the application for said temporary restraining order is hereby denied.

Done and Ordered at Pensacola, Florida, this 9th day of November A. D. 1937.

A. V. Long, District Judge.

IN UNITED STATES DISTRICT COURT

ORDER CONVOKING A STATUTORY THREE-JUDGE COURT—November 9, 1937

The above entitled cause coming on to be heard upon application made to the Judge of the Northern District of Florida, for a temporary restraining order, which said temporary restraining order was denied upon the affidavit of the Chairman of the State Road Department and the statement of counsel that no effort will be made to enforce the inspection provisions of Senate Bill No. 760 until after November 26, A. D. 1937; and it appearing that the Bill of Complaint is brought to enjoin A. B. Hale as Chairman, and certain other defendants as and constituting the State [fol. 44] Road Department of the State of Florida and to authorize and empower the State Road Department of the State of Florida, from the enforcement of said Senate Bill No. 760, which was passed at the session of the Legislature for 1937, being that certain statute of the State of Florida being entitled "An Act providing for the fixing of a mini-

mum standard for all cement offered for sale, sold or used in the State of Florida and to authorize and empower the State Road Department of the State of Florida to write rules and regulations for the effectual enforcement of this act; providing for the inspection of all cement imported and brought into the State of Florida from any foreign country and providing for an inspection fee to be paid for the inspection of all cement imported and brought into the State of Florida from any foreign country and offered for sale, sold, or to be used in the State of Florida; providing penalties for the violation of any of the provisions of this act as well as any rule or regulation promulgated by the State Road Department; and providing for the enforcement of the provisions of and regulations made in pursuance of this Act."—this being a case in which it is sought to enjoin the officials of the State Road Department from the enforcement of the inspections provisions of said act, the contention of plaintiff being that the Act (Senate Bill No. 760) violates the provisions of the Fourteenth Amendment of the Constitution of the United States, and impinges on the rights of plaintiff created thereby; and that it violates Section 8 of Article 1 of the Constitution of the United States in that it levies a tax on commerce between the United States and foreign countries and constitutes as such, a direct burden on such commerce, and that it likewise prohibits the importation in the State of Florida of a legitimate article of commerce; and that it also violates Section 10 of Article 1 of the Constitution of the United States in that it levies an impost or duty under the misnomer of an inspection law.

[fol. 45] Now, therefore, pursuant to Section 380, Title 28, U. S. C. A. I hereby call to my assistance for the hearing and determination of the application for temporary injunction applied for in said cause the Honorable Rufus E. Foster, United States Circuit Judge in and for the Fifth Circuit, and the Honorable Alexander Akerman, United States District Judge for the Southern District of Florida, the hearing of said cause to be held on Friday, the 26th day of November, A. D. 1937, at 10 o'clock A. M., in the United States Court Room in the City of New Orleans.

Martin H. Long, Esquire, Counsel for Complainant, will give notice at least five days before the date of said hearing to the defendant in said cause, and to Messrs. Whitaker and Whitaker, Tampa, Florida, of counsel for the Florida

Portland Cement Company, as well as to the Governor of the State of Florida and to the Attorney General of said State.

Done and Ordered in Chambers in Pensacola, Florida, this 9th day of November A. D. 1937.

A. V. Long, United States District Judge.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed November 24, 1937

The named defendants in this cause respectfully move the Court to dismiss the bill of complaint filed herein upon the following grounds:

1. There is no equity in the bill of complaint.

2. The bill of complaint fails to allege jurisdictional facts in that it does not allege that the matter in controversy exceeds exclusive of interest and cost the amount or value of Three Thousand Dollars.

3. The bill of complaint in attempting to allege excessiveness in the amount of the fees fixed by the Statute under attack alleges mere conclusions of the pleader and does not allege that the amount of fees levied for inspection purposes is not and will not be absolutely necessary to defray the expenses of inspection under the act.

[fol. 46] 4. This Court is without jurisdiction to grant the relief sought because of the prohibition contained in Section 265 of the Judicial Code, U. S. C. A., Title 28, Section 379, since the granting of an injunction as prayed would have the effect of staying the proceeding now pending in the Supreme Court of Florida against these defendants involving the validity of the Florida statute here under attack.

5. It appears from the allegations of the bill that the State of Florida, acting through its Legislature, had the power under Article 1, Section 10, clause 2 of the Federal Constitution to enact the statute here under attack and it does not appear that the amount of fees therein fixed will not be absolutely necessary for the purposes for which said fees are required.

6. By the provisions of Article I, Section 10, clause 2 of the Congress of the United States and not the Federal Courts has the power to revise and control the act here under attack.

Respectfully submitted, Cary H. Landis, Attorney General of Florida; H. E. Carter, Assistant Attorney General; Richard P. Daniel, R. W. Erwin, Solicitors for Defendants. Pat Whitaker, of Counsel.

IN UNITED STATES DISTRICT COURT

NOTICE OF HEARING—Filed November 27, 1937

To Hon. Fred P. Cone, as Governor of the State of Florida; Hon. Cary D. Landis, as Attorney General of the State of Florida; Messrs. Whitaker & Whitaker, Tampa, Florida, of Counsel for Florida Portland Cement Company, and the Defendants Above Named:

Please Take Notice that Bimco Trading, Inc., Plaintiff in the above entitled cause will on Friday, the 26th day of November A. D. 1937, at ten o'clock A. M. or as soon there- [fol. 47] after as counsel can be heard apply to the Honorable Rufus E. Foster, United States Circuit Judge, in and for the Fifth Circuit and the Honorable Alexander Akerman, United States District Judge for the Southern District of Florida, Hon. A. V. Long, United States District Judge for the Northern District of Florida, in the United States Court room in the City of New Orleans, State of Louisiana, for a temporary injunction to restrain the defendants from enforcing the inspection provisions of the Act of Legislature of the State of Florida of 1937, known as Senate Bill No. 760.

Martin H. Long, Solicitor for Plaintiff.

STATE OF FLORIDA,
County of Duval:

Martin H. Long, being first duly sworn deposes and says that on Friday, November 12th, A. D. 1937, at or about one o'clock p. m. he mailed a copy of the above notice to the persons named therein by depositing in the United States

mails at Jacksonville, Florida, copies of said notice addressed as follows:—

Hon. Fred P. Cone, Governor of Florida, Tallahassee, Florida.

Hon. Cary D. Landis, Attorney General of Florida, Tallahassee, Florida.

Messrs. Whitaker & Whitaker, Attorneys at Law, Tampa, Fla.

Hon. A. B. Hale, as Chairman of the State Road Department, Tallahassee, Fla.

That each of said envelopes was securely sealed and had thereon the necessary postage for transmission through the mails.

Martin H. Long.

Sworn to and subscribed before me this 12th day of November, 1937. Judson Freeman, Notary Public State of Florida at Large. My commission expires Jan. 12, 1941. (Official Seal.)

[fol. 48] IN UNITED STATES DISTRICT COURT

STATEMENT OF ALLEN J. WEAVER—Filed November 27, 1937

STATE OF FLORIDA,
County of Duval:

Allen J. Weaver, being first duly sworn, deposes and says that he is the owner of the Southern Analytical Laboratory, of Jacksonville, Florida, and as such duly authorized to make this affidavit; that the said Southern Analytical Laboratory is duly qualified and equipped to make engineering tests and chemical analysis, and has been engaged in the making of said tests and analysis for a period of ten (10) years; that the said Southern Analytical Laboratory has made numerous mill tests of cement, and the customary charge made for such tests has been about two cents (2¢) per barrel, a barrel being equivalent to four (4) bags and containing three hundred seventy-six (376) pounds of cement; that the said Laboratory has also made several tests of cement imported into the State of Florida by Bimco

Trading, Inc., and the customary charge made the said Bimco Trading, Inc. for such tests has been Ten Dollars ($10.00) per test.

Allen J. Weaver.

Sworn to and subscribed before me this — day of November A. D. 1937. —— ——, Notary Public, State of Florida.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CARL W. J. GRIMMELMAN—Filed November 27, 1937

STATE OF NEW YORK,
County of New York:

Carl W. J. Grimmelman, being first duly sworn, deposes and says he is General Manager of the Plaintiff herein, and as such is duly authorized to make this affidavit; that the plaintiff, Bimco Trading, Inc., now has some 52,000 bags of [fol. 49] cement, each containing ninety-four pounds net, loaded aboard the Steamship "Lisbeth", which is now at sea, and which is due to dock at Miami on Friday, the 26th day of November, A. D. 1937, and there discharge 40,200 bags of this cargo, and after discharging there, proceed to the port of Palm Beach, Florida, and discharge some 11,800 bags, the balance of the cargo; that all of the cement above mentioned was manufactured in a foreign country, and therefore subject to inspection under the provisions of Florida Senate Bill No. 760, and that plaintiff will be required under the provisions of said Senate Bill No. 760 to pay the sum of fifteen cents (15¢) per one hundred pounds, or a total of some Seven Thousand Three Hundred Dollars ($7,300.00) as a fee for this inspection; that prior to the enactment of the said Senate Bill No. 760, plaintiff would have been required to pay only the sum of Fifteen Dollars ($15.00) for inspection and test by a qualified and recognized inspecting laboratory of this entire cargo of cement and commercially accepted by architects, engineers, builders and contractors; that plaintiff cannot pass on to the buyers and consumers of this cement the approximately fifteen

cents (15¢) per bag it will be required to pay under the provisions of the said Senate Bill No. 760.

Carl W. J. Grimmelman.

Sworn to and subscribed before me this 24 day of November, A. D. 1937. Joseph Groeger, Notary Public, State and County Aforesaid. Notary Public Kings Co. No. 439. Reg. No. 9034, Cert. filed in N. Y. Co. No. 531. Reg. No. G331. Commission expires March 30, 1939. (Official Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF F. E. MILLER—Filed November 27, 1937

Bimco Trading, Inc., 225 Broadway, New York City, New York.

Attention Mr. Carl W. J. Grimmelman

DEAR SIR:

For your information we submit the following outline of testing services that we have rendered on cement imported by you into ports on the lower east Coast of Florida.

Several years ago when you first began importing cement into the Port of Miami, the first three or four cargoes were sampled and tested in accordance with A. S. T. M. standard [fol. 50] specifications for sampling and testing Portland Cement. For this service we were paid at the unit rate of one and one-half (1½¢) cents per barrel.

On later cargoes we took a composite sample of the entire cargo and made a physical and chemical test on this sample for which we were paid at the rate of twelve dollars and fifty cents ($12.50) per sample. Some cargoes were not sampled or tested at all.

In the services rendered on your behalf the sampling and testing has been done in accordance with the latest standard of the American Society of Testing Materials.

Very truly yours, The H. C. Nutting Company, by F. E. Miller, Branch Manager.

FEM:CSH.

Sworn and subscribed before me this 23rd day of November, 1937. Carolyn Hyatt, Notary Public State of Florida at large. My Commission expires Aug. 19, 1940. (Official Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF N. W. GRAVES—Filed November 27, 1937

To Whom it May Concern:

This is to certify that we have been handling and selling continuously since February, 1935, Aaolborg Cement, imported by the Bimco Trading Company, 225 Broadway, New York, N. Y., in the territory known as the greater Miami area. We have found it equal in quality to any other cement shipped into this area. We have supplied a great many of the larger structures that have been erected during this period of time and in each and every case the results obtained have been highly satisfactory.

Norman Graves Company, by N. W. Graves, Pres.

Sworn and subscribed before me this 23rd day of November, 1937. S. M. Sweeting, Notary Public State of Florida at Large. My Commission expires Feb. 21, 1941. (Official Seal.)

[fol. 51] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF P. H. BATES, CHIEF OF THE DIVISION OF CLAY AND SILICATE PRODUCTS, NATIONAL BUREAU OF STANDARDS, UNITED STATES DEPARTMENT OF COMMERCE—Filed November 27, 1937

P. H. Bates, being first duly sworn, deposes and says as follows:

1. I am the Chief of the Division of Clay and Silicate Products, National Bureau of Standards, United States Department of Commerce; Chairman of the Committee on Cement, Lime and Plaster of the Federal Specifications Executive Committee, which is the official body of the Fed-

eral Government charged with the establishment of standards for procurement by all Executive Departments and Establishments of the Federal Government; Chairman of the Committee on Cement, and member of the Executive Committee of the American Society for Testing Materials; and I am familiar with the standard specifications for cement used for construction purposes.

2. I have carefully examined the statute of the State of Florida, filed in the office of the Secretary of State of Florida on June 5, 1937, being Senate Bill No. 760.

3. I am familiar with the standard specifications for cements established by the Federal Specifications Executive Committee for cement used by the Executive Departments and establishments of the Government of the United States in most of their many construction activities and with the special specifications used for the purchase of cement in such special projects as Boulder Dam, Bonneville Dam and Grand Coulee Dam. I am also familiar with the inspection and testing which is made to determine whether the cement so used conforms to these standards. The inspection and testing is made under my direction and supervision. I am consequently also familiar with the cost to the Federal agencies concerned of such inspection procedure.

4. I am also familiar with the standard specifications for cement established by the American Society for Testing Materials which are prescribed in the Florida statute referred to in paragraph 2 of this affidavit as the standard to which all cement offered for sale or sold or used in the State of Florida must conform.

[fol. 52] 5. In my opinion the standards established by the Federal Specifications Executive Committee are more rigorous than those established by the American Society for Testing Materials, and consequently I believe that the costs of inspection and testing pursuant to the former standards should not be less than those carried out pursuant to the latter standards.

6. According to the official records of the National Bureau of Standards kept under my supervision and upon the basis of my personal experience in supervising the inspection and testing of cement referred to above which is purchased for

the use of the United States government, the inspection and testing of such cement pursuant to the standards established by the Federal Specifications Executive Committee cost the United States a maximum of 5¢ per standard unit (barrel of 376 pounds) when inspection and testing are made of small lots of cement of 400 barrels or less. When inspection and testing are made of larger lots, the costs are reduced, reaching a minimum of 1½¢ per barrel. The costs referred to in this and the succeeding paragraph include salaries of inspection officials and laboratory technicians, administrative and supervisory salaries and expenses, cost of materials, allowance for cost of equipment and replacement and repair thereof, clerical charges, and transportation of individuals, samples and equipment.

7. In my opinion a reasonable cost, computed on a liberal basis, for thorough and adequate inspection and testing of cement, pursuant to the standards established by the American Society for Testing Materials, should not exceed a maximum of 5¢ per barrel for lots of cement aggregating 300 barrels or less. For lots in excess of this amount, the reasonable cost for such inspection should, in my opinion, be suitably reduced.

P. H. Bates.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 24th day of November, 1937. Wm. C. Fewell, Notary Public. My Commission expires February 23, 1938. (Official Seal.)

[fol. 53] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF THE HONORABLE CORDELL HULL, SECRETARY OF STATE OF THE UNITED STATES—Filed November 27, 1937

Cordell Hull being duly sworn deposes and says:

1. I am the Secretary of State of the United States and as such it is my official duty to conduct, under the President of the United States, the foreign relations of the United States, including relations in connection with matters of foreign commerce and including specifically negotiations undertaken pursuant to the so-called Trade Agreement Act, being an amendment to the Tariff Act of 1930 (U. S. Code Tit. 19, Sec. 1351; 48 Stat. 943).

2. The statute of the State of Florida which is attacked in this suit has been officially called to my attention by a protest made on behalf of the Belgian Government and by other communications. The issues here involved relate to questions of the utmost public importance and I am informed the final determination of those issues may have a substantial effect upon the treaty making power of the Federal Government and upon the conduct of its foreign commercial relations.

3. For the above reasons I desire to set forth for the benefit of the Court certain facts of which I am cognizant and which are pertinent to the issues before this Court.

4. I am advised that the great bulk of domestic Portland cement consists of the standard or ordinary grade manufactured to conform to certain standard specifications generally adopted in this country, that the major portion of the imported cement likewise consists of the standard or ordinary grade produced to conform with domestic standards, and that there is accordingly very little difference in quality between this cement and the standard American grade. As is shown by Table I, which is attached hereto, United States manufacturers of Portland cement supply the great bulk of domestic requirements.

[fol. 54] 5. For many years comparatively small quantities of cement have been imported into the United States. Imported cement is used almost exclusively in certain coastal districts which can be economically served by the imported as well as the domestic product, due to advantageous transportation factors. Because of the weight of cement and the consequent high cost of transporting it overland, little imported cement is shipped beyond trucking distance of the port of importation. However, at the coastal points at which it can be imported, imported cement may play an important part in local construction. Imports into the United States of Portland and other hydraulic cement for a number of recent years are shown in Table I, together with the ratio of imports to domestic production.

6. For seventeen years prior to the passage of the Tariff Act of 1930, cement was on the free list although under the Tariff Act of 1922, a so-called "countervailing" or contingent duty was levied on cement. The statute provided that

the rate of the "countervailing" duty was to equal to the rate of the duty imposed on American cement by the exporting country. The Tariff Act of 1930 (U. S. Code, Tit. 19 Sec. 1001, Paragraph 205 (b) imposed a duty of six cents per hundred pounds on "Roman, Portland, and other hydraulic cement or cement clinker, * * * including the weight of the container." As a result of the imposition of a tariff on cement and of the decline in construction activities in the United States, accompanying the general business recession which occurred in the early part of the present decade, imports of cement were sharply curtailed in 1930 and the years immediately following.

7. On February 27, 1935, the United States entered into a trade agreement with the Belgo-Luxemburg Economic Union in which the United States granted a reduction of one and one-half cents per one hundred pounds in the customs duty applicable to Roman, Portland and other hydraulic cement or cement clinker of Belgian or Luxemburg origin. (Reciprocal Trade Agreement between the United States of America and the Belgo-Luxemburg Union, 49 Stat. 3680, 3681, 3691.) In return for this and other concessions and assurances granted by the United States, the Belgo-Luxem- [fol. 55] burg Economic Union granted important customs advantages to industrial and agricultural products of the United States.

8. The trade agreement with the Belgo-Luxemburg Economic Union was concluded under the authority of the so-called Trade Agreements Act, which amended the Tariff Act of 1930, by adding at the end of Title III thereof, Section 350 (U. S. Code, Tit. 19 Sec. 1351; 48 Stat. 943). This section authorized the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or of any foreign Country are unduly burdening the foreign trade of the United States, to enter into trade agreements with foreign governments or instrumentalities thereof and to proclaim "such modifications of existing duties and other import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any articles covered by foreign trade agreements as are required or appropriate to carry out any foreign trade agreements that the President has entered into" under the authority conferred on him in the section.

9. The authority of the President to proclaim modifications of existing duties and other import restrictions is subjected to certain restrictions and limitations set forth in the same section, the most important of which is that he may not alter any existing rate of duty by more than 50 per centum.

10. The objectives and policy of the Congress in enacting the "Trade Agreement Act," as expressed in that Act, were stated to be:

For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry mining and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign [fol. 56] markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States. * * *

11. The following comment was made upon the concession on cement granted to the Belgo-Luxemburg Economic Union in the official analysis of the trade agreement issued by the United States Department of Commerce:

A number of products affected by the concessions granted to Belgium are used by the building trades by other industries, and by agriculture. The prices of some of these products, especially in the building trades, have been maintained in recent years at levels considerably above prices in general and also above prices of other building materials. This price rigidity has reacted unfavorably upon the agricultural, building, and other industries utilizing these products. The reductions in duty provided in the Belgian agreement should introduce more flexibility in prices to the advantage of all these industries and to the building industry in particular. Among articles of this type are the following: * * * cement. * * * (Department of Commerce release of March 1, 1935, "An Analysis of the Trade Agreement between the United States and Belgium".)

12. Under the terms of Section 350 of the Tariff Act, the rates of duty and other import restrictions proclaimed in connection with trade agreements are extended to articles the growth, produce or manufacture of all countries, but the President is given authority to suspend the application thereof to articles the growth, produce or manufacture of any country which discriminates against the commerce of the United States. The provisions of the trade agreement with the Belgo-Luxemburg Economic Union, including the rate of duty on cement, were proclaimed by the President on April 1, 1936, (49 Stat. 3680, 3691). The rate on hydraulic cement of four and one-half cents per hundred pounds granted to the Belgo-Luxemburg Economic Union is, therefore, the effective rate of duty applicable to cement from all non-discriminating countries. At the present time, the rates of duty proclaimed in connection with trade agreements are extended to the products of all countries except Germany and Australia.

13. The State of Florida is an important market for imported cement. Imports entered in the Florida customs district, which comprise the entire State of Florida, during [fol. 57] several recent years are shown in Table II, attached hereto. During the year 1936, the only full calendar year during which the trade agreement with the Belgo-Luxemburg Economic Union has been in effect, 132,076,039 pounds of hydraulic cement or 21 per cent of total imports into the United States, were entered in the Florida district. Imports of such cement into Florida during that year were valued at $310,634. Approximately 70 per cent of the cement imported into Florida is supplied by Belgium.

14. The inspection fee provided for in the act of June 5, 1937, of the Legislature of the State of Florida amounts to 15 cents per one hundred pounds, of three and one-third times the customs duty levied by the Federal Government on hydraulic cement imported from Belgium and other non-discriminating countries. On the basis of a landed duty paid price of $1.60 per barrel of 376 pounds, at which I understand that imported cement is quoted at Florida ports, the fee is equivalent to an additional duty of approximately 35 per cent ad valorem. It seems probably that this large fee which is levied only on cement imported from foreign countries and not on cement produced in Florida and other states of the Union, will effectively prevent the importation

of foreign cement into Florida and consequently will impose a serious discriminatory burden upon the foreign commerce of the United States.

15. Furthermore, in view of the importance of Florida as a market for imported cement, the inspection fee levied by the State of Florida on cement of foreign manufacture is likely to nullify largely the concession granted in the trade agreement with the Belgo-Luxemburg Economic Union. The Belgian Government has protested to the Department of State against the Florida inspection fee, which it states is contrary to the spirit of the trade agreement and cannot fail to be a heavy burden on trade between Belgium and the United States.

Cordell Hull, Secretary of State of the United States.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 24th day of November, 1937. Percy F. Allen, Notary Public. (Official Seal.)

[fol. 58]

Table I

Portland and Other Hydraulic Cement: Imports* Into the United States From Principal Sources, 1929–1937

	1929	1930	1931	1932	1933	1934	1935	1936	Jan.-Aug. 1937
Quantity (1,000 lbs.):									
Belgium	445,998	172,320	37,299	27,643	58,262	39,979	89,622	318,161	235,732
Denmark	120,199	102,234	69,547	46,817	83,123	34,665	80,204	123,688	73,042
Germany	6,838	4,224	1,872	599	5,711	946	28,029	96,650	50,885
Netherlands	.....	.....	.....	.....	221	.....	.....	16,584	39,472
Norway	1,015	9	.....	.....	1,130	3,048	7,567	11,657	12,006
United Kingdom	67,084	75,676	41,128	81,553	19,261	3,406	950	5,748	a
All other countries	5,734	12,342	22,075	17,287	9,971	16,409	25,629	49,605	44,744
Total	646,868	366,805	171,921	173,899	177,679	98,453	232,001	622,093	455,881
Value:									
Belgium	$1,176,619	$472,045	$114,256	$63,533	$111,707	$95,548	$228,925	$701,867	$414,139
Denmark	413,805	351,854	195,587	92,469	188,673	97,356	234,820	317,325	181,407
Germany	33,914	24,706	9,231	2,129	12,559	3,246	58,258	190,954	92,644
Netherlands	.....	.....	.....	.....	536	.....	.....	28,024	68,933
Norway	3,671	.....	.....	.....	2,540	6,287	14,434	21,740	23,722
United Kingdom	267,281	235,673	121,675	153,674	43,365	7,586	9,675	29,029	a
All other countries	34,853	51,535	67,169	39,228	29,080	43,752	61,964	119,606	110,378
Total	1,930,143	1,135,813	507,918	351,033	388,460	253,775	609,076	1,408,545	891,223

* Imports for consumption, 1929, and 1934–1937; General imports in other years.
a Included in "other countries."
Source: Foreign Commerce and Navigation of the United States, and records of the Department of Commerce.

[fol. 59] Table I

Portland Cement, Domestic Production, and Total Imports Into the United States

Year	Production	Imports for Consumption*		Ratio of Imports to Production
		Quantity	Value	
	1,000 pounds	1,000 pounds		Percent
1920	37,608,740	195,948	$1,230,914	0.52
1921	37,164,610	45,991	388,828	0.12
1922	43,161,034	121,754	628,846	0.28
1923	51,685,049	631,109	2,963,833	1.22
1924	56,158,649	756,112	3,116,564	1.35
1925	60,783,747	1,374,692	5,814,163	2.26
1926	61,863,343	1,215,418	5,128,061	1.96
1927	65,125,649	770,923	2,960,577	1.18
1928	66,288,366	859,694	3,099,160	1.30
1929	64,162,910	646,868	1,930,143	1.01
1930	60,610,158	366,805	1,135,813	.60
1931	47,161,331	171,921	507,918	.36
1932	28,854,595	173,899	351,133	.61
1933	23,865,919	177,453	387,991	.74
1934	29,233,160	98,453	253,775	.34
1935	28,854,830	232,001	609,076	.80
1936	42,260,896	622,093	1,408,545	1.47
Jan. to Aug., 1937	29,304,312	455,881	891,223	1.55

* Including a small amount of other hydraulic cement.

Sources: Bureau of Mines, Department of the Interior: Foreign Commerce and Navigation of the United States Records of the Department of Commerce.

[fol. 60] Table II

Portland and Other Hydraulic Cement: Imports for Consumption Into the Florida Customs District

	From all countries		From Belgium	
	Pounds	Value	Pounds	Value
1935	35,644,047	$111,070	21,844,023	$61,162
1936	132,076,039	310,634	94,376,898	219,545
Jan.–August 1937	81,507,458	170,921	57,218,058	108,233

Source: Records of the Bureau of Foreign and Domestic Commerce, Department of Commerce.

[fol. 61] In United States District Court

Order Granting Interlocutory Injunction—November 27, 1937

Before Foster, Circuit Judge, and Akerman and Long, District Judges

This case came on for hearing on application for an interlocutory injunction and was argued by counsel. The Court being of the opinion that the interlocutory injunction should issue as prayed for it is so ordered. The Court reserves the

right to file findings of fact and conclusions of law at a later date.

It is further ordered that plaintiff give bond in the sum of $1,000, conditioned according to law, to be approved by the Clerk of the District Court.

Rufus E. Foster, U. S. Circuit Judge. Alexander Akerman, U. S. District Judge. A. V. Long, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

PETITION OF BROWARD COUNTY PORT AUTHORITY FOR LEAVE TO INTERVENE—Filed December 1, 1937

To the Honorable District Judge of the Above Styled Court:

The Broward County Port Authority, your petitioner herein, respectfully alleges and shows as follows:

1. That your petitioner, the said Broward County Port Authority, is a public corporation of Florida and is the governing authority of the Broward County Port District and that as such it operates Port Everglades, a deep water harbor located on the southeast coast of the State of Florida [fol. 62] between the cities of Fort Lauderdale and Hollywood and that the said Port Everglades has a substantial foreign trade and is particularly interested in the importation of foreign cement; that the importation of said foreign cement at Port Everglades constitutes one of the greatest sources of revenue to the said Port and that since the passage, during the 1937 session of the Florida Legislature, of that certain Act known as Senate Bill No. 760, providing for the alleged inspection of cement imported and brought into the State of Florida from any foreign country, the said Port Everglades has been greatly damaged and its cement business virtually stopped.

2. That the above entitled cause, your petitioner has been informed, was started in the United States District Court in and for the Northern District of Florida and was moved to the United States Circuit Court of Appeals for the Fifth Circuit in New Orleans for the purpose of having a three-judge court pass upon the constitutionality of the Act above referred to. That your petitioner has received a copy of the

bill filed as above set forth, but has not been able to secure a copy of any answer which might have been filed by the defendants in this suit, and is, therefore, unable to allege and set forth any allegations in any answer which might have been filed in this cause.

3. That the bill of complaint filed herein as above set forth shows that the plaintiff is a corporation organized and existing under and by virtue of the laws of New York State and that said corporation is a citizen and resident of the said State of New York and that the defendants and each of them are citizens and residents of the State of Florida. That said bill of complaint sets up the legislative enactment by the 1937 Florida Legislature of its Senate Bill No. 760 providing for the alleged inspection of cement imported and brought into the State of Florida from any foreign country and attached to the said bill of complaint is a copy of said Act marked Exhibit "A". Said bill of complaint also sets up the fact that the plaintiff is an importer and large dealer in cement imported from Scandinavian countries and that said cement so imported is of a superior quality and complies in all respects with the stand-
[fol. 63] ard set up by the said legislative enactment above mentioned and that said cement so imported by said plaintiff has complied with said standards as therein set forth for a number of years last past.

4. Said bill of complaint also sets forth that said Act was passed to benefit a Florida corporation known as the Florida Portland Cement Company, which manufactures cement at Tampa, Florida, which organization is the only concern manufacturing cement in Florida at the present time. The plaintiff further alleges that said Act is unconstitutional and void and in violation of the Constitution of the United States of America in a number of respects therein set forth and said bill also sets forth that in the event said Act is enforced that said Act will prevent the plaintiff from making any sales of cement whatever in the State of Florida and cause its contracts in said State to be broken, to its immediate and irreparable injury.

5. That for the reasons above set forth, your petitioner is unable to set forth in this application the nature of the defense to be filed by the defendants in this suit, but that the undersigned attorney for your petitioner was informed by

an official of the Florida Portland Cement Company on the 17th day of November A. D. 1937, that a defense was being filed through the law firm of Whittaker & Whittaker of Tampa, Florida, who would be present in the City of New Orleans, Louisiana, before this Honorable Court on the 26th day of November A. D. 1937, at which time this matter is set down for hearing.

6. That your petitioner has an interest in the litigation in the above entitled cause against the defendants therein arising out of the fact that the Broward County Port Authority, the governing body of the Broward County Port District and Port Everglades, has a large business in dealing in foreign cement which has virtually stopped since the passage of the Act above mentioned and that the sailing of all vessels which were to bring cement into Port Everglades has been cancelled since the passage of said Act, as set forth in a copy of the bill of intervention of your petitioner which is attached hereto and made a part hereof and which your petitioner wishes to file in the above entitled cause after [fol. 64] first securing leave of this court.

7. That the interest of your petitioner in the above entitled cause is such that its intervention in this cause is necessary to the protection of its interests alleged in paragraph 6 hereof.

8. That copies of both your petitioner's bill of intervention and petition for leave to intervene have heretofore been mailed to the following: Martin H. Long, attorney for the plaintiff in the above action, 1309 Barnett National Bank Building, Jacksonville, Florida, Messrs. Whittaker & Whittaker, Attorneys at Law, Tampa, Florida, and Richard P. Daniel, Attorney for the State Road Department, Tallahassee, Florida, and it is respectfully requested that said bill of intervention be considered by the court as having been filed against both the original plaintiff and the defendants in said suit and that both be required to answer said bill of intervention *or* or before fifteen days after the filing of same and that your petitioner hereby offers to contribute to the expenses of said suit its just proportion thereof to an amount which the said court shall deem proper.

Wherefore, petitioner, having an interest in such matter herein, which is still in litigation and which will soon be

under consideration of this court, respectfully prays that an order may be entered herein permitting it to intervene and assert its interest in said suit in accordance with Equity Rule 37, such intervention to be in subordination to and in recognition of the propriety of the main proceeding and that your petitioner may have further relief in the premises as in equity it may be entitled to and as to this court may seem just and fit.

Dated this 24th day of November, A. D. 1937.

R. R. Saunders, Attorney for Petitioner, 808 Sweet Building, Fort Lauderdale, Florida.

[fol. 65] IN UNITED STATES DISTRICT COURT

BILL OF INTERVENTION OF BROWARD COUNTY PORT AUTHORITY —Filed December 1, 1937

The Intervener above named, by leave of the court first had and obtained, files this, its Bill of Intervention, against the above named respondents and says:

1. That Bimco Trading, Inc., a corporation of New York, the original plaintiff herein, filed its bill of com- herein on or about the — day of ——, A D. 1937, against A. B. Hale as Chairman, and E. A. McColskey, John Hughey Faulk, Brocks W. Bateman and James W. Perkins as and constituting the State Road Department of the State of Florida, defendants herein, to have declared unconstitutional, null, void, and of no further force and effect Senate Bill No. 760 passed in the 1937 session of the Florida Legislature, a copy of said senate bill being attached to and made a part of said original bill of complaint, which said bill of complaint stated among other things as follows:

That the plaintiff therein is a corporation organized and existing under and by virtue of the laws of New York State and that said corporation is a citizen and resident of the said State of New York and that the defendants and each of them are citizens and residents of the State of Florida. Said bill of complaint sets up the legislative enactment by the 1937 Florida Legislature of Senate Bill No. 760 providing for the alleged inspection of cement imported and brought into the state of Florida from any foreign corporation. Said bill of complaint also sets up the fact that

the plaintiff is an importer and large dealer in cement imported from Scandinavian countries and that said cement so imported is of a superior quality and complies in all respects with the standard set up by the said legislative enactment above mentioned and that said cement so imported by said plaintiff has complied with said standards as therein set forth for a number of years last past.

[fol. 66] That said bill of complaint also sets forth that said Act was passed to benefit a Florida corporation known as the Florida Portland Cement Company, which manufactures cement at Tampa, Florida, which organization is the only concern manufacturing cement in Florida at the present time. The plaintiff further alleges that said Act is unconstitutional and void and in violation of the Constitution of the United States of America in a number of respects therein set forth and said bill also sets forth that in the event said Act is enforced that said Act will prevent the plaintiff from making any sales of cement whatever in the State of Florida and cause its contracts in said State to be broken, to its immediate and irreparable injury.

2. That your petitioner has received a copy of the bill of complaint filed as above set forth, but has not been able to secure copy of any answer which might have been filed by the defendants in this suit, and is, therefore, unable to allege and set forth any allegations contained in any answer which might have been filed in this cause.

That the undersigned attorney for your intervener was informed by an official of the Florida Portland Cement Company on the 17th day of November, A. D. 1937, that a defense was being filed through the law firm of Whittaker & Whittaker of Tampa, Florida, who would be present in the City of New Orleans, Louisiana, before this Honorable Court on the 26th day of November, A. D. 1937, at which time this matter is set down for hearing.

3. That the Broward County Port Authority, intervener above named is a public corporation of Florida and is the governing authority of the Broward County Port District and that as such it operates Port Everglades, a deep water harbor located on the southeast coast of the State of Florida between the cities of Fort Lauderdale and Hollywood and that the said Port Everglades has a substantial foreign trade and is particularly interested in the importation of

foreign cement; that the importation of said foreign cement at Port Everglades constitutes one of the greatest sources of revenue to the said Port and that since the passage, during the 1937 session of the Florida legislature, of that cer- [fol. 67] tain Act known as Senate Bill No. 760 providing for the alleged inspection of cement imported and brought into the State of Florida from any foreign country, the said Port Everglades has been greatly damaged and its cement business virtually stopped.

That the intervener above named has an interest in the litigation in the above entitled cause against the defendants arising out of the fact that the Broward County Port Authority, the governing body of the Broward County Port District and of Port Everglades, has a large business in dealing in foreign cement which has virtually stopped since the passage of the act above mentioned and that the sailing of all vessels which were to bring cement into Port Everglades has been cancelled since the passage of said act; and that if said Senate Bill No. 760 of the 1937 Florida Legislature above referred to is allowed to stand it will greatly hamper the said Port Everglades, operated by your petitioner herein, in its foreign trade and that said bill so places a burden on foreign cement imported into said Port Everglades that it will stop all such foreign business and will cause the French Line, which now operates a regular freight service from Port Everglades, to cease its operations into Port Everglades.

That said act of the Florida Legislature above refer-ed to has been in effect about six weeks and has caused the revenues of the Broward County Port Authority to de-line at the rate of many thousand dollars a month and has caused labor payrolls at said Port to stop to the extent of about $3500.00 per month and has caused the customs collections at said Port Everglades to decline to the extent of about $5,000.00 per month.

4. That, furthermore, the above mentioned Act which is now sought to be declared unconstitu-ional, does not require any inspection or levy of any inspection fee upon any cement manufactured and sold and used in the State of Florida or imported into Florida from any other state of the United States, but only provides for the inspection of and payment of fees with respect to cement imported into the State of Florida from any foreign country; and that said

Act places a distinct burden upon commerce with foreign countries and is, therefore, void, because the Federal Con-
[fol. 68] stitution grants the Congress of the United States the power to regulate commerce with foreign countries in precisely the same language as it does commerce among the states and that a state statute such as the one above mentioned unlawfully discriminates against goods imported from foreign countries into Port Everglades and other ports of Florida.

5. That your intervener would further show unto the court that said state statute above mentioned is a tax and a duty laid upon a commodity, to wit: cement, in order to throttle competition with a domestic corporation of Florida and as illustrative of this fact your intervener shows that recently a shipment of cement was unloaded at Port Everglades consisting of 60,000 sacks containing 100 pounds each and that the inspection fee as provided in the state statute above mentioned of $3.00 per ton would have aggregated the sum of $9,000.00 to inspect this one shipment, when as a matter of fact, the actual cost of inspection on a basis of the largest cost possible for a thorough inspection of such cargo could not exceed the sum of $225.00, or approximately one-fortieth of the tax levied under said state statute.

6. Intervener refers to all the allegations in the original complaint herein, in so far as they are not inconsistent with the foregoing allegations and the claim of the intervener, and makes said allegations part of this complaint.

7. This intervening petitioner, desiring to prosecute this suit, as co-plaintiff with said Bimco Trading, Inc., as well as for itself, and to obtain all the relief sought and prayed for by said Bimco Trading, Inc., adopts and makes its own, in every respect and particular, each, every and all the allegations contained in said bill of complaint herein filed by Bimco Trading, Inc., and likewise adopts and makes its own the prayer of said bill of complaint, and prays that all the relief sought and prayed for by said Bimco Trading, Inc., be granted to this intervening petitioner, as well as to said Bimco Trading, Inc.

[fol. 69] 8. That this bill of intervention is filed in subordination to and in recognition of the propriety of the main

proceedings in accordance with Equity Rule No. 37, and your petitioner prays that in addition to the relief prayed for in the original bill of complaint filed herein that it may have such further relief in the premises as in equity it may be entitled to and as to this court may seem just and fit.

Wherefore, this plaintiff refers to, repeats and re-alleges the prayer for relief contained in the bill of complaint of Bimco Trading Inc., filed in the above entitled cause on or about ——, A. D. 1937, with the same force and effect as if said prayer for relief were herein set out at length, and prays that this plaintiff may have the benefit of any and all proceedings had in said above entitled cause.

R. R. Saunders, Attorney for Intervener, Broward County Port Authority, 808 Sweet Building, Fort Lauderdale, Florida.

Duly sworn to by H. G. La Bree. Jurat omitted in printing.

[fol. 70] Bond on injunction for $1,000.00, approved and filed December 3, 1937, omitted in printing.

[fol. 71] In United States District Court

Order Granting Broward County Port Authority, Authority to Intervene—November 26, 1937

[fol. 72] This Cause coming on to be heard on the 26th day of November A. D. 1937, on the petition of Broward County Port Authority, governing body of Broward County Port District, for leave to intervene in the above entitled suit and to be made a party plaintiff thereto and the petition having been duly considered and it appearing to the Court that the Broward County Port Authority, a public corporation of Florida, has an interest in the above entitled suit sufficient to warrant it to become a party to the suit,

It is therefore, hereby ordered, adjudged and decreed that said Broward County Port Authority be and it is hereby granted leave to intervene in said suit as a party plaintiff and to prosecute this cause in accordance with the prayer of its petition.

It is further hereby ordered, adjudged and decreed that service of a copy of said bill of intervention may be made by delivering a copy thereof — the attorneys for the original parties to this suit, That said bill of intervention when filed be considered as filed against the original plaintiff as well as the defendants and upon service of a copy of said bill of intervention upon them, both the original plaintiff and the defendants shall file answer thereto on or before fifteen days thereafter. That said Broward County Port Authority, as intervening plaintiff herein, be and it is hereby allowed 20 days from this date in which to file brief herein.

Done and Ordered in the city of New Orleans, Louisiana, on this the 26th day of November, A. D. 1937.

A. V. Long, District Judge of the above styled court.

[fol. 73] IN UNITED STATES DISTRICT COURT

ORDER ENTERING TEMPORARY INJUNCTION—Filed December 9, 1937

The President of the United States of America to A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and Constituting the State Road Department of the State of Florida, and Each of Them and to Their and Each of Their Servants, Agents, Attorneys, Employees, Workmen and Confederates, Greeting:

Whereas Bimco Trading, Inc., a corporation, plaintiff, in that certain cause now pending in the United States District Court for the Northern District of Florida in Equity, has filed a bill of complaint against the above named defendants and has obtained a temporary injunction as prayed for in the said bill of complaint,

Now therefore we, having regard for the matters in said bill of complaint contained, do hereby temporarily command and strictly enjoin you and each of you and your servants, agents, attorneys and employees and all persons acting in aid of or in conjunction with you or any of you, from enforcing or attempting to enforce the inspection provision of the Act of the Legislature of Florida known as Senate Bill #760 of the year A. D. 1937, which commands and injunctions you are respectfully required to observe and obey

until our said District Court shall make further order in the premises, and herein fail not under penalty of the law thence ensuing.

Witnesseth, the Hon. Franklin D. Roosevelt, as President of the United States of America: the Hon. Charles Evans Hughes, as Chief Justice of the Supreme Court of the United States of America; and the Hon. A. V. Long, as Judge of the United States District Court for the Northern District of Florida, in the City of Pensacola in the said Northern District of Florida on this the 3rd day of December, A. D. 1937.

W. Logan Hill, Clerk of the District Court for the Northern District of Florida. (Seal.)

[fol. 74] UNITED STATES MARSHAL'S RETURN

Received the within writ on the 5th day of December, 1937, at Marianna, Florida and executed the same on the 5th day of December, 1937, at Tallahassee, Florida by handing to and leaving with the within named A. B. Hale, as Chairman of the State Road Department of the State of Florida, a true and correct copy of this writ and at the same time I exhibited the original writ and made the contents of same known to him.

E. M. Sessoms, United States Marshal, by Adam M. Lewiss, Deputy.

December 8th, 1937.

IN UNITED STATES DISTRICT COURT

STIPULATION THAT MOTION TO DISMISS SHALL APPLY TO BILL AS AMENDED—Filed December 31, 1937

It is hereby agreed by and between the respective counsel of record for the Plaintiff and Defendants, that the motion to dismiss the bill of complaint filed herein on the 24th day of November, 1937, shall stand and apply to the bill of complaint as amended, except that counsel for the defendants hereby abandon the second ground of said motion by reason of the amendment to the bill of complaint.

This the 29th day of December, A. D. 1937.

Martin H. Long, Attorney for Plaintiff; Cary D. Landis, Attorney General; H. E. Carter, Assistant Attorney General; R. W. Erwin, Jr., Attorneys for the Defendants.

[fol. 75] IN UNITED STATES DISTRICT COURT

AMENDMENT TO BILL OF COMPLAINT—Filed January 6, 1938

Comes now the complainant in the above entitled cause, and amends its bill of complaint by adding thereto, the following paragraph:

19. The plaintiff further alleges that the amount involved herein, exceeds the sum of Three Thousand Dollars ($3000.00) exclusive of interest and costs.

M. H. Long, Attorney for Plaintiff.

Duly sworn to by M. H. Long. Jurat omitted in printing.

The defendants by the undersigned consent to the foregoing amendment to the bill of complaint.

This 28 day of December, A. D. 1937.

Cary D. Landis, Attorney General. H. E. Carter, Assistant Attorney General. R. W. Erwin, Jr., Attorney State Road Dept.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS BILL OF COMPLAINT—March 8, 1938

[fol. 76] This case came on for hearing on a motion to dismiss the bill and was argued by counsel. The court being of the opinion that the motion is not well taken it is overruled and denied.

It is further ordered that defendants be allowed thirty days in which to answer.

This March 3rd, 1938.

Rufus E. Foster, U. S. Circuit Judge. Alexander Akerman, U. S. District Judge. A. V. Long, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

MOTION FOR DECREE PRO CONFESSO—Filed April 20, 1938

Comes now the plaintiff in the above entitled cause and moves the court to enter a decree pro confesso or default against the defendants herein, because of their failure to plead or answer to the bill of Complaint and amend-

ment thereto, filed herein, in accordance with the order of this court dated March 3rd, A. D. 1938.

Martin H. Long, Solicitor for Plaintiff.

Before me this April 18th, 1938. A. V. Long, Judge.

IN UNITED STATES DISTRICT COURT

CERTIFICATE THAT NO ANSWER OR OTHER PLEADING HAD BEEN FILED BY THE DEFENDANTS SINCE THE ORDER OF MARCH 3, 1938—Filed April 20, 1938

UNITED STATES OF AMERICA,
Northern District of Florida:

I, William Logan Hill, Clerk of the United States District Court for the Northern District of Florida, do hereby certify that no answer or other pleadings have been filed by the defendants in the case of Bimco Trading, Inc., vs. A. B. Hale et al., as Members of the State Road Department of the State of Florida (Case No. 27-E), since the order of this Court overruling their motion to dismiss heretofore filed herein.

[fol. 77] In Witness Whereof, I have hereunto set my hand and the seal of said court, at Tallahassee, Florida, this 9th day of April, A. D. 1938.

William Logan Hill, Clerk U. S. Dist. Court for Northern District of Fla., by R. B. Marsh, Deputy Clerk. (Seal.)

Before me this 18th day of April, 1938. A. V. Long, Judge.

IN UNITED STATES DISTRICT COURT

DEFAULT AND FINAL DECREE—June 14, 1938

This cause coming on this day to be heard on the motion of the plaintiff for the entry of a default or decree pro confesso against the defendants herein, and it appearing to the court and the court finding that the defendants have not filed any answer or other pleadings since the overruling of their motion to dismiss, by order of this court, dated March 3rd, A. D. 1938; and that the time for such pleading has elapsed; now therefore, it is,

Ordered, Adjudged and Decreed, that a Decree Pro Confesso be and the same hereby is entered against the said defendants; and that the bill of complaint and amendment thereto, be and the same are hereby taken as confessed; and the plaintiff further moving for the entry of a final decree herein, making permanent the interlocutory injunction heretofore issued herein, now therefore, upon consideration thereof, it is,

Ordered, Adjudged and Decreed, that the interlocutory injunction heretofore issued herein, be and the same is hereby made permanent, and the defendants, A. B. Hale, E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, be and they hereby are permanently enjoined and forever restrained from enforcing or seeking to enforce the inspection provisions of that certain Act of the Legislature of the State of Florida, passed in 1937, and known as Senate Bill No. [fol. 78] 760, insofar as it relates to the inspection of cement imported into the State of Florida from foreign countries by the plaintiff; and it is further

Ordered, Adjudged and Decreed that the injunction bond given herein by the plaintiff, be and the same hereby is cancelled, and the plaintiff and its surety thereon, be and they are hereby jointly and severally, released and forever discharged from and on account of all liability thereon or thereunder.

Done and Ordered this 14 day of June, A. D. 1938.

Rufus E. Foster, United States Circuit Judge. Alexander Akerman, Judge of the United States District Court for the Southern District of Florida. A. V. Long, Judge of the United States District Court for the Northern District of Florida.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL UNDER SECTION 266 OF THE JUDICIAL CODE (U. S. C. A. TITLE 28, SECTION 380) FROM FINAL DECREE GRANTING PERPETUAL AND PERMANENT INJUNCTION—Filed September 6, 1938

A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins,

as and constituting the State Road Department of the State of Florida, defendants in the above cause, feeling aggrieved by the final order or decree of the statutory court invoked under Section 266 of Judicial Code, entered on the 14th day of June A. D. 1938, prays an appeal therefrom to the Supreme Court of the United States.

Wherefore, in order that A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins as and constituting the State Road Department of the State of Florida, defendants, may obtain relief in the premises, and for opportunity to show the errors complained of, pray that they may be allowed said appeal agreeable with the statutes and rules of the court in such case made and provided, that proper orders touching the securities required of them be made.

George Couper Gibbs, Attorney General of Florida; H. E. Carter, Assistant Attorney General; ——, Attorney for State Road Department, for the Defendants. Tom Whitaker, Pat Whitaker, of Counsel.

[fol. 79] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed September 6, 1938

Come now A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman, and James W. Perkins, as and constituting the State Road Department of the State of Florida, defendants in this cause, and file the following assignment of errors, upon which they will rely in the prosecution of the appeal from the final decree made and entered in this cause on the 14th day of June, A. D. 1938, and say that the court erred in the following respects:

First Assignment of Error: The Court erred in entering its order granting interlocutory injunction on November 27, 1937.

Second Assignment of Error: The Court erred in entering its interlocutory injunction on December 3, 1937—wherein it temporarily enjoined the defendants from enforcing or attempting to enforce the inspection provision of the Act of the Legislature of Florida, known as Senate Bill No. 760 in 1937.

Third Assignment of Error: The Court erred in entering its order on March 3rd, 1938, overruling defendants' motion to dismiss the bill of complaint.

Fourth Assignment of Error: The Court erred in entering its final decree on June 14, 1938, wherein it permanently enjoined and forever restrained the defendants from enforcing or seeking to enforce the inspection provisions of that certain Act of the Legislature of the State of Florida known as Senate Bill No. 760 of 1938.

Fifth Assignment of Error: The Court erred in not dismissing the bill of complaint.

Sixth Assignment of Error: The Court erred in granting its interlocutory injunction on December 3, 1937, and failing to make findings of fact and conclusions of law, which constituted the grounds of its action as required by Federal Equity Rule No. 70½, as amended.

Seventh Assignment of Error: The Court erred in entering its final decree on June 14, 1938, and failing to make [fol. 80] findings of fact and conclusions of law, as required by Federal Equity Rule No. 70½ as amended.

Eighth Assignment of Error: The Court erred in failing to hold that Section 265 of the Judicial Code, being Section 379, Title 28, U. S. C. A., prohibited the court from granting the injunctive relief as prayed in the bill of complaint.

Ninth Assignment of Error: The Court erred in overruling defendants' motion to dismiss bill of complaint on the ground that the court was without jurisdiction to grant the relief sought because of the prohibition contained in Section 265 of the Judicial Code, being Section 379, Title 28, U. S. C. A., since the granting of an injunction as prayed would have the effect of staying the proceeding then pending in the Supreme Court of Florida against these defendants, involving the validity of the Florida statute under attack in this cause.

Tenth Assignment of Error: The Court erred in overruling defendants' motion to dismiss bill of complaint on the ground there was no equity in the bill of complaint.

Eleventh Assignment of Error: The Court erred in overruling defendants' motion to dismiss bill of complaint on the

ground that under the allegations of the bill of complaint the State of Florida, acting through its Legislature had the power under Article I, Section 10, Clause 2, of the Constitution of the United States, to enact the Statute here under attack.

Twelfth Assignment of Error: The Court erred in overruling defendants' motion to dismiss the bill of complaint on the ground that, by the provisions of Article 1, Section 10, Clause 2, of the Constitution of the United States, the Congress of the United States, and not the Federal Courts, has the power to revise and control the Statute here under attack.

Thirteenth Assignment of Error: The Court erred in making and entering final decree herein on June 14, 1938, in favor of the plaintiff and against the defendants.

Wherefore, defendants pray that said final decree may be revised, and for such other and further relief as to the Court may seem just and proper.

[fols. 81-84] George Couper Gibbs, Attorney General of Florida; H. E. Carter, Assistant Attorney General; —— ——, Attorney for State Road Department, for the Defendants. Pat Whitaker, Tom Whitaker, of Counsel.

[fols. 85-86] In United States District Court

Order Allowing Appeal—September 6, 1938

This cause coming on this day to be heard upon the petition filed by A. B. Hale, as Chairman, and E. A. McColksey, John Hughey Faulk, Brooks W. Bateman, and James W. Perkins, as and constituting the State Road Department of the State of Florida, defendants, for an order allowing an appeal, and it appearing to the court that there was presented with said petition, assignments of error, and a separate typewritten statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the final decree in this cause, as required by Rule 12 of the Rules of the Supreme Court of the United States.

It is hereby ordered that the Appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the final order or decree rendered in this cause on the 14th day of June, A. D. 1938; that said defendants give a bond with good and sufficient security in the sum of $500.00 conditioned that they, as Appellants, shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, said bond to be [fol. 87] approved by this Court.

Done and Ordered this 6 day of September, A. D. 1938.

A. V. Long, Judge of the District Court of the United States in and for the Northern District of Florida.

Bond on Appeal for $500.00, approved and filed September 6, 1938, omitted in printing.

[fols. 88-89] Citation, in usual form, showing service on Martin H. Long et al., filed September 12, 1938, omitted in printing.

[fol. 90] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed September 6, 1938

To the Clerk of the Above Styled Court:

You will please prepare transcript of record in the above styled cause, to be filed in the Supreme Court of the United States, and included in said transcript of record the following papers, to wit:

1. Bill of complaint filed November 4, 1937.
2. Affidavit of A. B. Hale, filed November 9, 1937.
3. Certified copy of pleadings and opinion of Supreme Court of Florida in the case of State of Florida ex rel. Florida Portland Cement Company vs. A. B. Hale, as Chairman et al., before the Supreme Court of Florida, filed November 9, 1937.
4. Order denying temporary restraining order filed November 9, 1937.

5. Order convoking three judge court filed November 9, 1937.

[fol. 91] 6. Motion to dismiss bill of complaint filed November 24, 1937.

7. Notice of hearing filed November 27, 1937.

8. Unsworn statement of Allen J. Weaver filed November 27, 1937.

9. Affidavits of Carl W. J. Grimmelman F. E. Miller, N. W. Graves, P. H. Bates and Cordell Hull, all filed November 27, 1937.

10. Order granting interlocutory injunction filed November 27, 1937.

11. Petition for leave to intervene by Broward County Port Authority and bill of intervention filed December 1, 1937.

12. Injunction bond filed December 3, 1937.

13. Order granting Broward County Port Authority leave to intervene filed December 5, 1937.

14. Order entering temporary injunction with return showing service filed December 9, 1937.

15. Stipulation that motion to dismiss shall apply to bill as amended filed December 31, 1937.

16. Amendment to bill of complaint filed January 6, 1938.

17. Order overruling motion to dismiss bill of complaint filed March 8, 1938.

18. Motion for decree pro confesso filed April 20, 1938.

19. Certificate of Clerk that no answer or other pleading had been filed by the defendants since the order of March 3, 1938, filed April 20, 1938.

20. Default and final decree filed June 16, 1938.

21. Petition for appeal filed September 6th, 1938.

22. Assignments of Error filed September 6th, 1938.

23. Jurisdictional statement filed September 6th, 1938.

24. Order allowing appeal filed September 6th, 1938.

25. Bond for costs filed September 6th, 1938.

26. Citation to Appellee and proof of service thereof filed September 6th, 1938.

27. Proof of service upon Appellee of the following papers: (1) copy of petition for appeal; (2) copy of order allowing appeal; (3) copy of assignments of error; (4) copy [fol. 92] of jurisdictional statement; (5) statement directing attention of Appellee to the provisions of paragraph 3,

Rule 12 of the rules of the Supreme Court of the United States filed September 6, 1938.

28. These directions for making up the transcript of record showing service of Appellee.

George Couper Gibbs, Attorney General of Florida; H. E. Carter, Assistant Attorney General; ——, Attorney for State Road Department, for the Defendants. Pat Whitaker, Tom Whitaker, of Counsel.

Proof of service of the foregoing praecipe to the Clerk showing service on Martin H. Long, attorney for Bimco Trading, Inc. a corporation, and R. R. Saunders, attorney for Broward County Port Authority, a public corporation, plaintiffs (Appellees) in the above cause, was filed by the defendants on the 7th day of September, A. D. 1938.

[fol. 93] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 94] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed October 15, 1938

Now comes A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of Florida, appellants herein, by their undersigned attorneys, and set forth the following Statement of the Points on which they intend to rely in seeking a reversal of the Final Decree in this cause, to-wit:

First Point

The Court erred in entering its Order Granting Interlocutory Injunction on November 27, 1937.

[fol. 95] Second Point

The Court erred in entering its Interlocutory Injunction on December 3, 1937, wherein it temporarily enjoined the

appellants from enforcing, or attempting to enforce, the inspection provision of the Act of the Legislature of Florida, known as Senate Bill No. 760 of 1937.

Third Point

The Court erred in entering its Order on March 3, 1938, overruling appellants' Motion to Dismiss the Bill of Complaint.

Fourth Point

The Court erred in entering its Final Decree on June 14, 1938, wherein it permanently enjoined and forever restrained the appellants from enforcing, or seeking to enforce, the inspection provision of that certain Act of the Legislature of the State of Florida, known as Senate Bill No. 760, of 1937.

Fifth Point

The Court erred in not dismissing the Bill of Complaint.

Sixth Point

The Court erred in granting its Interlocutory Injunction on December 3, 1937, and failing to make findings of fact [fol. 96] and conclusions of law which constituted the grounds of its action, as required by Federal Equity Rule 70½ as amended.

Seventh Point

The Court erred in entering its Final Decree on June 14, 1938, and failing to make findings of fact and conclusions of law, as required by Federal Equity Rule 70½ as amended.

Eighth Point

The Court erred in failing to hold that Section 265 of the Judicial Code, being Section 379, Title 28, U. S. C. A., prohibited the Court from granting injunctive relief, as prayed in the Bill of Complaint.

Ninth Point

The Court erred in overruling appellants' Motion to Dismiss Bill of Complaint, on the ground that the Court was without jurisdiction to grant the relief sought, because of the prohibition contained in Section 265 of the Judicial

Code, being Section 379, Title 28, U. S. C. A., since the granting of an injunction as prayed, would have the effect of staying the proceeding then pending in the Supreme Court of Florida, against these appellants, involving the [fol. 97] validity of the Florida statute under attack in this cause.

Tenth Point

The Court erred in overruling appellants' Motion to Dismiss Bill of Complaint, on the ground there was no equity in the Bill of Complaint.

Eleventh Point

The Court erred in overruling appellants' Motion to Dismiss Bill of Complaint, on the ground that under the allegations of the Bill of Complaint, the State of Florida, acting through its Legislature, had the power, under Article I, Section 10, Clause 2, of the Constitution of the United States, to enact the statute here under attack.

Twelfth Point

The Court erred in overruling appellants' Motion to Dismiss the Bill of Complaint, on the ground that, by the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, the Congress of the United States, and not the Federal Courts, has the power to revise and control the statute here under attack.

Thirteenth Point

The Court erred in making and entering Final Decree herein on June 14, 1938, in favor of the appellees, and against the appellants.

[fols. 98-99] The entire transcript of the record, as certified to by the Clerk of the District Court of the United States, in and for the Northern District of Florida, and filed in this cause, is deemed necessary to be printed for the consideration of the points above set out.

George Couper Gibbs, Attorney General of Florida; H. E. Carter, Assistant Attorney General, Attorneys for Appellants. Pat Whitaker, Tom Whitaker, of Counsel.

[fol. 100] STATE OF FLORIDA,
County of Leon, ss:

On this day personally appeared before the undersigned authority duly authorized to administer oaths, H. E. Carter, Assistant Attorney General of the State of Florida, who being first duly sworn, deposes and says that he did on this day serve a copy of the Statement of the Points on which appellants intend to rely in the above cause and of the parts of the record which appellants think necessary for the con-
[fols. 101-102] sideration thereof, upon Ma 'n H. Long, as attorney for the appellee, Bimco Trading, Inc., a corporation, and R. R. Saunders, as attorney for the appellee, Broward County Port Authority, a public corporation. The service was made by mailing said copies, sealed in envelopes addressed respectively to the said Martin H. Long, 1309 Barnett National Bank Building, Jacksonville, Florida, and to the said R. R. Saunders, 808 Sweet Building, Ft. Lauderdale, Florida, with sufficient postage thereon to insure delivery at destination, the same being mailed in the post office at Tallahassee, Florida, on this the 30th day of September, A. D. 1938.

H. E. Carter.

Sworn to and subscribed before me on this the 30 day of September, A. D. 1938. Erma K. Vason, Notary Public, State of Florida at large. My Commission expires Oct. 24, 1938. (Seal.)

[fol. 103] [File endorsement omitted.]

Endorsed on cover: File No. 42,903. N. Florida, D. C. U. S. Term No. 418. A. B. Hale, as Chairman, and E. A. McColskey et al., etc., appellants, vs. Bimco Trading, Inc., and Broward County Port Authority. Filed October 15, 1938. Term No. 418, O. T., 1938.